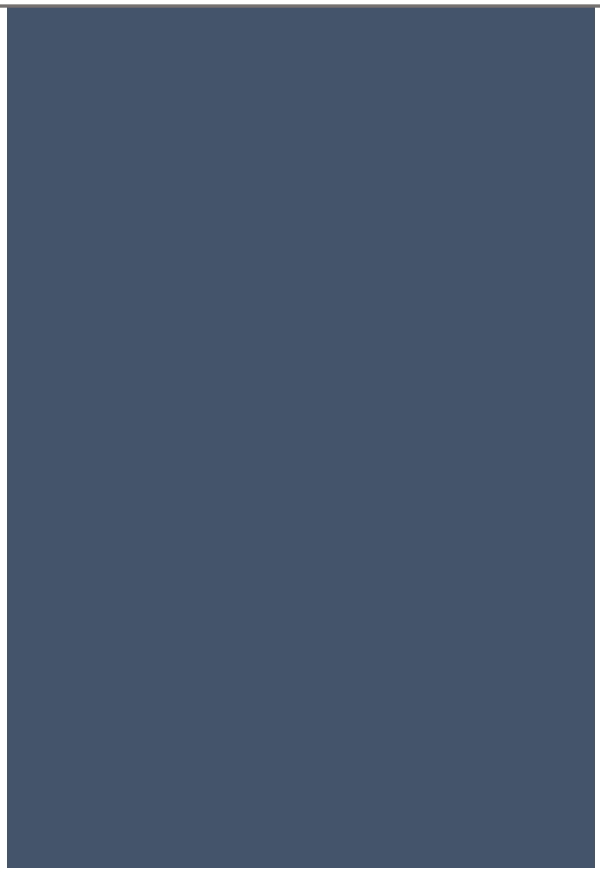

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SOME THOUGHTS FOR A CRITICAL COMPARISON IN CONTRACT LAW

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I. PRELIMARY REMARKS

The course of the twentieth century is characterized by the growing influence of social justice within private law. The liberal conceptions of the classical legal thought failed to portray the actual transformation from a set of formal notions regarding private autonomy and freedom of contract to the idea that, in different contexts, individuals were not so autonomous and free to contract.[1] In particular, this transformation imposed a limitation to the freedom of contract and its binding force and introduced a series of duties to protect the weaker party and to avert unfairness. Similarly, social justice within the law of property meant the introduction of the social function idea and the consequent elaboration of a series of limits to the classical concept of liability, based on fault in tort law.[2]

This social approach spread in European and North American legal systems on the one side mainly through legislation (and more rarely the judge through general clauses), which took a primary role through the legal protection of specific categories of weaker parties (workers, consumers) and on the other, through courts, which began deploying doctrines to pursue the socialization of private law.[3] After World War II, in Europe the process continued with the new generation of constitutional charters. Several

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1 For a further focus on the globalization of the 'Social', see D. Kennedy, (2006) 'Three Globalizations of Law and Legal Thought' in D. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal*. Cambridge: Cambridge University Press (2006) 37 ff. See also, Hesselink, M. (2008) *CFR and Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law: What Roles for Fairness and Social Justice?*, Centre for the Study of European Contract Law Working Paper Series No. 2008/04, 16 ff.

2 On the social function of property idea, see M.R. Marella, The Core of Property (unpublished paper available from the author).

3 See D. Kennedy, (2006) 'Thoughts on Coherence, Social Values and National Tradition in Private Law' in M. Hesselink (ed.), *The Politics of a European Civil Code*. The Hague: Kluwer 44–46.

Constitutions drafted during these years were profoundly influenced by social justice ideas: the Italian Constitution, for example, contains the duties of solidarity (article 2), the conception of substantial equality (article 3) and the idea of the social function of property (article 42). Similar pronunciations may be found in the Constitutions of Germany, Spain, Greece and Portugal. The socialization of private law is pursued deploying the constitutional tools: contract, property and tort law are studied through the social principles stated in the Constitutions. Moreover, this process of socialization of private law has profoundly affected European legal systems recalibrating the private/public divide and enhancing a new idea of private law as another tool to redistribute power among the different categories of individuals.[4]

The social seems now to be part of that whole of common interests, beliefs and values which constitute the European legal tradition.

By the appeal to the social European tradition, some scholars working on issues of European integration seem sometimes to constitute a new contract law under their influence that can be used against the influence of US dominated global contemporary legal consciousness. In contracts, for instance, a conception grounded on altruistic good faith is pitted against a more individualistic American conception of contract. A similar position, grounded on social justice, is sometimes taken against EU private law and its functional approach.[5] The European legal tradition is called on to slow down the harmonization projects.

At the same time, the social has undergone a striking process of transformation. Legislation and intervention by the judge (through general clauses) which were the key tools of the second globalization, for its capacity to bring back into discussion the boundaries between law and policy with reference to social realities and to the creativity of the judge, have been redeployed. Now they are not used to react against an exceedingly individualistic approach in the name of the public interest. On the contrary, their goal is to enhance autonomy. Private autonomy as self-determination becomes a

[4] D. Kennedy, *supra*, note 3, 19 ff.; D. Caruso,'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' 3 *ELJ* 3–32 (1997).

[5] On this point, see M. Hesselink, *The New European Legal Culture*. Deventer: Kluwer,2001, 37–49; T. Wilhelmsson, 'Varieties of Welfarism in European Contract Law', 10 *ELJ* 712 (2004) 712 ff.;B. Lurger, 'The Future of Contract Law between Freedom of Contract, Social Justice and Market Rationality', 1 *ERCL* 442–468(2005); H. Collins, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone', 2 *ERCL* 213–26 (2006).

value, which is at the core of consumer protection – a value to be balanced eventually with other competing values.

II. The Construction of Legal Tradition

In this short sketch there are many features, which deserve a closer analysis from a comparative perspective.

The first is the renewed focus on tradition. Tracing back the roots is a work of representation and its process of construction and reconstruction gradually occupies a central place in comparative studies. An investigation into legal tradition may better be understood as a self-reflection and critical interrogation of the various and conflicting political projects underlying comparative law. Together with style, the way law is produced over and over again by its institutional actors and represented to get its legitimacy, canons, etc., that is tradition, plays a central role in our studies. It is a sign of the undeniable aesthetic dimension of law.

The second is the emergence of distributive analysis, the analysis of the institutional structure that governs the discipline of transactions and economic relations, on which the power and possibilities of the parties depend.[6] Every change in that institutional structure and its background rules is able to affect the power of the parties and the power of groups and categories to which these parties belong. This is a feature particularly important with reference to the ambiguity of the advocacy of certain (social) values.

They look at wholly different features: the former at the representative moments and the latter at the operational rules (background rules). But both reinstate politics at the center of the stage in private law and in comparative law and both are necessary for a serious critical analysis.

If it is necessary to move out of the ideological mechanisms and produce a critique of the process of meaning production, at the same time it is also necessary to avoid the trap of reducing everything to a discourse or an epistemic question. If the critique and the dismantling of the previous order may often reveal the marginalization

[6] The focus of the analysis is not on general notions defining contract or property but on those specific background rules that assure their operation, those rules that create limits to the parties of a contract. Within these limits, the parties can take advantage of their own specific competence, their information and even other resources, such as a social position or strength.

or suppression of other discourses inherent to the text itself, what is at stake is not only the repression of a discourse but also the consequences of this repression.[7]

Law is simultaneously a body of ideological representations of space and a collection of material practices, which maintain social order and govern space. In fact, space is also a bundle of relations and networks that make social action possible. To reconstruct a national or regional identity is to redistribute wealth and power. It is therefore important to ask who wins and who loses. The different opinions may be better understood in terms of ideological disputes over the acceptable limits of redistributive projects.

As to the latter, it is also important to remember that advocacy of social values is not self-explanatory: It is not per se progressive or egalitarian. Some ambiguities arise when we move from the market to the family or privacy sphere. In the latter, the social may be identified with duties of solidarity or relation of authority, and is often connected to a traditionalist agenda of upholding the dominant morality. In that sphere a progressive project seems better deployed by tropes such as self-determination or autonomy which would be considered conservative in the law of the market.

Every legal intervention is open to biases and blind spots. Legal reforms or legal changes require in fact a more complex analysis, with a frank assessment of distributive effects. It is noteworthy to underline the cross-subsidy effect in which redistribution occurs within the same section of society.[8] It is very interesting to note how often representations, theoretical statements and argumentations provided to explain legal rules may reveal the same legal rules to be redundant and even contradictory. This trend opens the way for a sort of 'false consciousness' very close to the ideology, just in the same light underlined by Marx a couple of centuries ago.

As to the former, it is important to remember the increasing importance of legal tradition as a renewed tool for analysis in the field of comparative law, something totally different from the usual units of analysis such as functions, operational rules and their justificatory arguments. Legal traditions are not only a challenge to the old taxonomies in

[7] The material consequences they produce are assured by the means of a complex bulk of devices, such as 'dispositifs', conceived as an involved networks of relations, which link different strategies and techniques together.

[8] These effects require an accurate inquiry in order to clarify their general impact. In fact, costs may be reallocated, as is the case in all relations between professionals and consumers. See D. Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power', 41 *Maryland Law Review* 563–65, (1982).

the name of a more dynamic and flexible approach. Very often legal traditions are deployed or used strategically to advance various projects, such as to resist or slow down integration, to negotiate a strategy to minimize how much to give up in the encounter with other legal systems.

In this perspective, legal traditions are not only another exercise in re-mapping the world but also a tool to challenge the taxonomic exercise in itself. To map the world you combine and re-combine pre-existing elements according to a theory of the basic units and structure you think relevant and the respective weight you assign to the different elements. As 'critical legal geographers', comparative lawyers are interested in the way their discipline draws lines of inclusion and exclusion. In this work it is important to identify cultural and legal elements which can be included, and are actually included, in a tradition, the way in which tradition works combining and re-combining their constitutive elements and foundational myths, the way in which it adapts and maintain its distinctiveness and makes strategic use of law in relationship with other cultures.[9]

In this project it is possible to understand comparative law as the analysis of plural ways of combining cultural and legal elements with rhetorical devices ground a memory. The genealogical method can provide the tools to challenge the coherence of the reconstruction. Genealogy makes it possible to situate historical events not along a unique model of development, but alongside different paths of possibilities and shows other roads which, at the moment of the choice, were not followed. In this sense, the resulting choice is only the result of a series of contingent events.

Any totalizing or organic understanding of tradition fails to take into account the role that individual actors can play in generating meaning and, in particular, it fails to account for conflicting understandings and views within every tradition. Tradition as context, tradition as culture is not smooth but it is the product of conflicts.

The focus of comparative law is on the 'dissemination of discursive practices', which shapes the legal consciousness of the authors and marks the boundaries within which hegemonic and counter-hegemonic projects can take place. Legal consciousness is

[9] Recently, the study of borders and limits. It has been proposed that there should be a more complex topology and a more critical approach to borders. Instead of the border in which what is in and what is out is clearly defined, in which you are included or excluded, we can imagine an in-between, a threshold of indistinction between inside and outside, inclusion and exclusion, a field which is characterized not by opposition but by a tension between poles that requires you think in a different way, a space which is not seized, impossible to map.

the complex system of distinct and multiple building blocks, such as a common conceptual vocabulary, a set of potential rule solutions, typical arguments pro and con, organizational schemes, modes of reasoning, which are actually considered typical in each given experience. To study legal consciousness means to identify the elements of the system and the balance between forces (explicit and implicit) operating in a specific legal field on which depends the way in which the elements combine in any given period.[10]

The assumption that not only the objects of the analysis but also the subjects are socially and culturally constituted is crucial. Thus the subjective side of knowledge moves to center stage in the comparative analysis and comparative law has to face the constraint of forms of knowledge production and their engagement with governance. By treating consciousness as a historical product, the analysis shifts attention to the constitution of the structure in historically specific situations and the way it contributes to the asymmetries in the abilities of individuals and social groups to define and realize their projects.

The reference to 'historical forms of consciousness or subjectivity' emphasizes that subjects can work only within specific contexts which provide the language they can speak when they have to face a specific legal issue. The more relevant questions for comparative law become to understand the way in which the consciousness is shaped, who shapes it and what the purpose of the whole enterprise might be.

III. FROM CLASSIC TO CONTEMPORARY COMPARATIVE LAW

This marks a strong difference between classic and contemporary comparative enterprise. Comparative studies turn to the humanities, the sciences which study the complex relationships between individuals and knowledge, individuals and culture. The encounter with various strands of critical theory had a very important impact on comparative law and its critique of the processes of meaning production.

Combining the structural approach with the identity turn and then with the post-structuralist and the post-colonial turns, comparative law provides the basis for a critique of hidden assumptions, normative inconsistencies, fallacies and interests associated with particular imaginations and categories and a critique of the latent that limit, through a

[10] The medium is constraining but also plastic, its flexibility depending on the elements (signatures) which mark it and refer it to a specific interpretation and context.

variable mix of consent, coercion and other technologies of domination the capacity to advance a project of emancipation.

In comparative law, functionalism, due to its anti-formalist approach, emphasized the connections between law and social context. This perspective focused on the function of the legal instruments in order to address issues and problems in the society. The goal was to measure the distances between different legal systems, using the function as a *tertium comparationis*. Through this functional comparison, societies (or at least most of them) appeared to be facing the same issues, their solutions differed only because the tools employed to solve them are affected by the specific legal culture that influences the lawyers of each legal system.

The variety of the different legal cultures influences the legal tools employed only and it doesn't spread to the results. Such aspect allows this type of comparison to develop a critical approach towards those legal cultures, as for example the Italian, still affected by formalism. Functionalists rely on historical dimension and variability of legal institutions that can nevertheless be used to perform the same function in different legal systems as tools to weaken the reification of legal concepts.[11] On the other hand, this method pushes them to identify which solution addresses better a specific legal issue. So, they determined (by using the comparative argument as an interpretative tool or as a possible *de iure condendo* answer) that some solutions are better than others and can be seen as models to imitate. Specific differences, related to irrational elements or historical accidents within a particular legal systems, were easily dismissed. The faith in the function replaced the faith in the essence.

Functionalism, in its pretension to universal science, faces two mortal enemies: first, the critique regarding its dismissal of every other (cultural) element, different from the function and secondly, the critical approach towards its adoption, through the functional paradigm, of determined cultural perspectives, deeply connected to specific legal systems and far from universal applications.

The functionalist approach was, most of all, an attempt to grasp the interrelations between law and society. Essentially, functionalism was a response to conceptualism and the split between legal reasoning and social context. It sought to understand policy-oriented decisions that stand behind positive legal rules: how legal systems employ different tools to realize their specific policy. In this vision, law became both an

[11] An emblematic text is Z. Zweigert, and H. Kötz, (1998) *Introduction to Comparative Law*. Oxford: Clarendon Press, 1998.

instrument to drive the evolution of society and a key factor of change within society, reducing in this way the juxtaposition between application and creation of the law.

Functionalism, as a theory of the relationship between law and society, had to struggle not just against the so called 'dark sides' of the regulation, but also with a task growing more and more difficult: matching the events produced within a particular society (social and economic phenomena) and a determined legal form. The solution identified by the functionalist approach, the functional analogue, turned out to be a double-edged sword.[12] In fact, the intellectual efforts needed to detect these functional analogues and their uncontrolled proliferation weakened the functionalist theory, preventing its generalization. For these reasons, functionalists decided to focus on restricted and more generic goals, in which legal rules were employed as means to ensure predictability and stability of legal relations, a set of minimum conditions in order to preserve economic exchanges. Obviously, these struggles undermined further the method.

By the end of the 1970s, an alternative approach gained importance within comparative legal studies. This method focused on the constitutive role of law, highlighting its capacity to provide visions of the world that are used to frame social relations and determine their concrete terms and on the resulting complexity in keeping law apart from culture and society. Unfortunately, the study has always remained on a high level of abstraction.[13] Under these circumstances, it has been quite easy for the structural approach to strike down the functional method and so chop off the link between law and society.

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12 In this sense, functionalism can be considered as subversive and so is the comparative law inspired by this method. Cf. H. Muir Watt, 'La fonction subversive du droit compare', *Rev. int. dr. comp.* 503 (2000).

13 The critique of functionalism moves from the critique of the generalization represented by the adoption of the function, the *presumptio similitudinis* to the use of 'functional analogues', a particular problem or issue within a given society cannot be the same in another (among the others, G. Frankenberg, 'Critical Comparisons', *Harvard Int'l LJ.* 411–45 (1985); J. Husa 'Farewell to Functionalism or Methodological Tolerance', *Rabels Zeitsschrift für auslandisches und internationals Privatrecht*, 419 (2003); R. Michaels R. 'The Functional Method of Comparative Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*. Oxford: Oxford University Press, 2007; Graziadei, M. (2003) 'The Functional Heritage' in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press, 2003, 100. The critique of functionalism is connected to the critique of scientism in A. Somma, *Tecniche e valori nella ricerca comparatistica*. Turin: Giappichelli, 2005, 3 ff.

IV. The Legacy of Heterodoxy

The success of Schlesinger's factual approach during the 1960s offered an alternative way to overcome conceptualizations, beyond the strict boundaries of functionalism. In the course of the well-known Cornell seminars, the comparative endeavor focuses on how legal systems usually solve a particular legal issue: starting from a typical problem originated from a hypothetical case, focusing on the factual elements that characterize each solution, avoiding any type of national conceptual category.

The rehash of the Cornell method by the structural approach allows significant progress in comparative legal studies, highlighting how, within every legal system, there is not always just one legal solution, on the contrary, there are various possibilities, as many as the formulations.

Every single legal system is formed by a multiplicity of legal formulations that develop independently and whose interaction allows us to confer a meaning to legal rules. Due to several factors, such as the circulation of models from different legal systems, these formulations may not only contradict each other (fundamental dissociation), as happens when the positive legal rule is different from the one established by the courts or elaborated by legal scholars. The contradiction can also be found within a single legal formulation (internal dissociation).[14] Every formulation may elaborate both an operative rule (a set of factual elements that are necessary to provide a certain legal effect) and a declamatory rule that is meant to describe the rule itself and to affect the way these rules are perceived and evaluated.

For these reasons, there is a plurality of possible solutions and also a plurality of possible justifications. So, the justifications, as we will see, can be related to the solutions in different ways: they can be completely overlapped, they can be superfluous or even contradictory.

In the structural approach, the context is interpreted as structure and not as social background. The components of a legal system can be evaluated only in relation to each

[14] The reference point is always represented by the coercive institution through market law and the rules that govern the relations among individuals; cf. M. Barcellona 'La scienza giuridica italiana ed il marxismo, prima e dopo "l'uso alternativo" del diritto', *Riv. crit. dir. priv.* 2000, 715; G. Marini, 'Gli anni settanta della responsabilità civile. Uno studio sulla relazione pubblico/privato (parte II)', *Riv. crit. dir. priv.* 2008, 229.

other.[15] Structuralism allows legal comparison to become, at the same time, a theory of interpretation aimed at criticizing the conception of law as a merely linguistic construction, and a legal process theory aimed at analyzing the (dynamic) relationships between the different components within a particular legal system that operate in the production and the enforcement of law.

For these reasons, two major changes were introduced within comparative legal studies. First, legal comparison didn't dismiss but rather recognized and embraced blanks, ambiguities and conflicts inside the legal rule. According to the structural linguistics, legal structuralists emphasize the spread between significance and significant: the interpretation of the legal rule is arbitrary and depends on the complex composition and re-composition of legal formulations within each legal system.

The structural approach could be considered as an anti-formalistic method. So, structuralism, as any other anti-formalism, could be involved in a scientific endeavor (reconstructive) or in a critical analysis (deconstructive).

Within structuralism, it was possible to find both the tools to unpack the idea of completeness of the legal dogmatism, highlighting the multiplicity of different solutions and the conflict among them, and the instruments to affect this completeness.

On one side, the different solutions provided by the legal formulations and their contradictions could enhance those alternative reconstructions that were eclipsed by the dominant ones. The former assumed the role of dangerous supplement, highlighting an aporia that showed how these dominant reconstructions were substantially partial and how they betrayed their coherence conditions. These premises made it possible to situate historical events not along a unique model of development, but alongside different paths of possibilities. In this sense, the chosen path wasn't mandatory, only the result of a series of contingent events. This theory, applied to national legal systems and besides any deconstructive implications, is basely a critique of the internal coherence of single legal models and rules very similar to the critical positions of American legal realism.

On the other side, the analysis of the internal dynamics of law could have allowed us to predict the outcome of a possible conflict among the formulations. In fact, if it is possible to analyze the institutional conditions that characterize their competition, the factors that influence such competition, the official (theories) and unofficial (cryptotypes)

[15] They both share the need to go beyond the concepts to focus instead on the substantial problem K. Zweigert, H. Kötz, *supra,* note 11 or on solutions: a set of factual elements that determine a single legal effect (cf. R. B. Schlesinger, *Formation of Contracts: A Study on the Common Core of Legal Systems.* New York: Oceana Publications, 1968).

facts, the implicit (cryptotypes again) and explicit connections – not necessary determined by human actor – that can affect decisions, then this method can reduce or even reset the indefiniteness.

At the same time, this approach cut the last ties that connected law to society. Through the observation of the different legal systems, Sacco showed how societies characterized by deeply different socio-economical structures have adopted the same legal rules, while on the contrary, societies which share the same socio-economic structure have chosen quite different legal rules.

V. Ideology and Legal Arguments

The study of the internal dynamics of law had unveiled another quite important aspect. We are talking about the need to explore not only the results provided by the different legal systems, but also the way in which (within a single framework delimited by the tools and the restrictions provided by the legal tradition) the outcome is produced, described and justified.

If it is quite normal for interpreters to give motivations in order to legitimize their choices, it is very interesting to note how often representations, theoretical statements and argumentations provided to explain legal rules may be revealed to be redundant and even contradictory vis-à-vis the same legal rules. Interpreters are well aware of these aspects. These justifications influence the way in which rules are embraced and evaluated within every legal system. So, they can provide a 'false consciousness' of what the system actually produces.

At the same time, justifications, as well as the whole system of representations provided by the interpretative practices, have an extremely important goal of social communication and social stability. The ideological aspect that affects these justifications and representations is now quite clear, understood as a 'false consciousness' of the realty. This phenomenon can be found typically in openly politicized legal systems, such as once the Soviet one, but it is also quite normal in any other system, starting from those systems which, like the French legal system, were historically influenced by *jus* naturalism. It is no surprise that the Code was the ground where the synecdoche was tested, this

figure of speech, in which a part is used to refer to the whole, allows and makes easier the separation between operational rule and declamation.

The synecdoche makes room for ideology. This ideological component works on different levels. First, it operates at a more general level, where ideology involves interpretation and in which the whole interpretative process is considered purely technical. This legal reasoning can be exclusively deductive or policy-oriented, taking into account the social interests (often conflicting) protected by the legal rules. According to this representation, the interpreter denies his creativity, legitimizing the product of his work as neutral.

At the same time, within the comparative legal studies, an 'apologetic' component appears: representations are useless to the elaboration of a solution, but they can be very helpful to provide and develop 'visions of the world', discourses and narratives that can be imitated and duplicated over and over again. Different representations are functional to elaborate projects for intellectual *élites*. For example, representations, which depict, through comparison, different legal models as prestigious can help realize projects in favor or against the particular legal system that originated the same model, inspiring or activating resistance and opposition. We are very close to the idea of using cultural products as tools to eliminate or to substitute an hegemony.

Comparative law meets the disciplines, which study the relationship between individuals and knowledge and individuals and cultures. It is at this juncture that comparative law goes beyond the identification of legal formulations and their deconstruction and turns to narratives and discourses. This aspect is strictly connected to the idea of belief systems: those collectively delimitated structures of thinking which, implicitly or explicitly, direct the way interpreters think. These intellectual paradigms of historical and contingent nature restrict the field where interpreters' conditions of possibilities can work and determine the achievable outcomes.

It is interesting to note that the ideological and apologetical component, underlined by the separation between the process of rule selection and its justifications, is quite common. In fact, the study of several specific discourses, that are used to explain and justify the adoption of particular legal rules of private law, can highlight the recurring division between theoretical declamations, rules presented and the outcomes obtained in different contexts.

VI. Contractual Justice as a Legal Discourse: Some Examples and Their Distributional Impact

This is the case, for example, of those discourse that are connected to the application of several rules of contractual justice. This legal field perhaps represents the example of greater separation between theoretical justifications – historically inspired by deeply committed declamations in favor of the highest reconstructive principles distinctive of the various ages in which they established themselves – and operational rules that produced specific distributive outcomes.

Within the contractual justice field, while justifications swung from the will theory, the 'social' and finally solidarity, operational rules often produced outcomes particularly difficult to match with these statements of principles.

We only need mention how the classical legal thought grounded contractual remedies firmly on the will theory. Within this limited framework, however, it was possible to pursue projects of different types not always in line with their purported justifications. Thus by recognizing the actionability of the remedy only on the behalf of the seller of land, French courts only ended up by protecting the landowner against speculation by bourgeois merchants.

With respect to the 'social', the rules enacted by the German Civil Code in 1900 were seen as a necessary concession to the protection of the 'weak parties' (2 Bürgerliches Gesetzbuch (BGB), section 138). Their practical operation produced results often at odds with the spirit of the innovation. By a narrow interpretation of the requirements (necessity, inexperience and carelessness) and preventing the judge from reshaping the contract, they depleted the remedy of any utility for the weak parties, who had to bargain again on the market for the performance.

Today, regarding solidarity, which is at the core of many of the contractual justice discourses, particularly in EU law, it is necessary to perform the same kind of careful analysis to double check its operation in different contexts and settings with respect to its distributive impact.

The forward expansion of the unconscionability clause to cover any kind of 'excessive and unjustified advantage' (UNIDROIT Principles, article 3.10) and 'unjust profit or iniquitous advantage' (Principles of European Contract Law (PECL), article 4:109), levelling the way towards an 'adaptation' of the contract by the judge, goes well

beyond any remedy anticipated by national legislation. Nevertheless it is very well possible that the remedy will work only to restore the functionality of the market, in particular the conservation of the contract with reference to the equilibrium that would have been reached in a comparable but 'perfectly' competitive market.[16]

This approach opens the way to another quite interesting development in the study of the effects of legal rules. This field of research is not entirely new, it is quite familiar to comparative legal studies that are usually connected to economic analysis in general and Law and Economics in particular.

The idea of operational rule as a set of relevant elements necessary to produce a result allows not only a better approach for scholars interested to understand similarities and dissimilarities between the different legal systems, but also a series of other intriguing results. Beyond declamations and conceptual structures of each legal system, operational rules enhanced a more accurate analysis of how rules work within different societies, in particular they could unveil the effect (incentives) of these rules on the behavior of the components of given society.

This formulation has also be used to test the efficiency of the rules with respect to allocating resources or reducing costs[17] and consequently to evaluate which rule should be used within a project of harmonization of the law or which rule was the fittest in order to circulate among the legal systems.[18]

The employment of the consideration and its functional analogues (causa) to select which promises and contracts should be considered legally binding highlighted how decisions taken by the different legal systems in those circumstances are policy-oriented. Deciding that only those promises or bargains supported by a sufficient consideration or other relevant (in terms of efficiency) elements represents a huge step forward to prove that these outcomes could be considered really efficient.

The result of the operational rules can also be compared to the declamations. Here, the patterns of the economic analysis allowed a critical control of the possible separation between declamations and the rules made by the courts, exposing the cleavage

[16] Consumer relationships deserve a close analysis in themselves for their many different cross-subsidy effects.

[17] See R. Cooter, 'Le migliori regole giuste', *Quadr.* 1991, 526; U. Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics', 14 *Int'l Rev. Law and Economy* 3 (1994).

[18] See the application of Calabresi's Chart (G. Calabresi, A. Melamed, 'Property Rules, Liability Rules, Inalienability Rules: One View of the Cathedral', 85 *Harvard L Rev.* 1089 (1972)) to the inter-proprietary conflicts in U. Mattei, *Tutela inibitoria e tutela risarcitoria*. Milan: Giuffrè, 1987.

between the substantial level of the operational rules (remedies) and the formal level of the conceptualizations of a particular system.[19]

VII. Final Remarks: The Focus on Background Rules

In any case, even with the more critical approaches, Law and Economics does not take into account any consequences different from the efficient allocation of resources. The idea was that the only possible goal – shared also by classical economic analysis – should have been to ensure to the entire society the 'bigger cake' (without any discussion about the way in which this cake should be divided). This aim was considered the only one legitimately pursuable using private law rules.

The new stream restates the importance of distributive consequences that follow the operational rules. This approach does not lead to any Marxist analysis,[20] in the sense that does not take into consideration the fate of the capitalist system, but it focuses only on 'local' conflict with small interests at stake.

So, it is necessary to rethink the role of operational rules: if once they were used only to evaluate the more efficient allocation, now they have become a way to understand how resources and power were distributed.

The recent discussion regarding the projects of harmonization of contract law focused on the fact that an adoption or the modification of a particular legal rule – also through the simple consolidation of a judicial orientation – can change the outcomes of the conflict between the different parts, but also among the categories and the groups to which the parts belong (the related distribution of the resources).

The debate does not involve configurations or general notions regarding contract, property or anything else, but it focuses on those background particular rules that assure their operation, those rules that create limits for the parties of a contract. Within these limits, the parties can take advantage of their own specific competence, of the information they can collect and even of other resources, such as social position or strength.

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[19] The disagreement persists only regarding the criterion with which this aim must be pursued; this criterion allows us to state that the method is substantially neutral, but see E. Baker, 'The Ideology of the Economic Analysis of Law', 3 *J Phil. and Pub. Aff.* 3 (1975) and D. Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique', 33 *Stan. L Rev.* 387 (1981).

[20] In this sense, no rule is precise and strong enough to frame an entire system inside a particular logics.

Every change (even small) in the institutional structure that governs the discipline of transactions and economic relations is able to produce re-distributive effects relevant to the power of the parties and the distribution of resources.[21] There is no field within private law that can be considered not affected by these effects.

These rules create the substantial framework where the social and economic relations among the different groups operate. Such rules are normally considered neutral or at least scarcely relevant, but they decide the position of strength of each individual and also how much they can obtain through the relations of cooperation and competition between one another. This perspective also allows consideration of whether the presence of the same rule, or its possible modification, may alter the relationships of strength between groups and how much the individuals belonging to that group may obtain when they enter into conflictual or cooperative rapport with the other.

[21] These effects demand for an accurate inquiry in order to clarify their general impact. In fact, as in all the re-distributive phenomena, sometimes costs can be re-allocated, as happens with the relations between professionals and consumers. See D. Kennedy, *supra*, note 8.