BETWEEN CONTINUITY AND DISCONTINUITY. THE EVOLUTION OF THE CIVIL CODE SYSTEM IN ITALY*

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Referring to Italy, a famous Italian jurist, Natalino Irti, has borrowed the words of Stefan Zweig to define the period from the mid-nineteenth century to the early twentieth as "the world of security". According to the liberal-bourgeois paradigm, the "free and owner" individual is the pivot around which all social relations are built; law prepares the necessary tools so that he can achieve the goals he wishes.

Nonetheless, law resolves itself into the State. It is no coincidence that the promulgation of the civil and commercial codes in 1865 has been an imperative act of the government, which, through a delegation, has taken the decisive phase of its elaboration off the parliamentary debate.

The Italian Civil code is based on the model of the Code Napoléon, direct heritage of Illuminism and the French revolution. Its goal is not to improve the legal structure of the past, but to cast itself into the future. In this respect, a unitary project, guidelines and a logical structure are needed. According to the revolutionary idea of law as social control and the cement of power, it must be clear, simple and abstract.

Codes are fixed and durable structures that must guarantee private autonomy as a free choice of ends. Regarding the essential requirements for the validity of contracts, art. 1104 of the 1865 Italian Civil Code, like its French counterpart (1134), merely mentions "a legitimate cause to be obliged".

Family law, with the prevailing protection of the legitimate family, follows the model of a society founded on the economy of the time, which was agricultural and artisan.

On the assumption of equality, lawmaker's intention was to make a clean sweep of ancient regime's social and economic complexity. Any mention of professional associations is completely absent. In the field of labor, liberal ideology requires individual employment relationships to be submitted to the general rule of private contracts, in compliance with the freedom of competition. Respecting the principle of *laissez faire*, the law offers only procedures and schemes of action.

But the post-unitary codes were already born old. During the fifty years following 1865, the agrarian society suffered the repercussions of industrialization. The individual employment contract goes beyond the old-fashioned lease scheme. Trade

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union freedom, in progressive affirmation, leads to the definition of collective agreements and the recognition of the right to strike. "Probiviral" jurisprudence builds the foundations of future labor law. The measures in terms of assistance and social security assume social implications. As for commercial law, the social defects of the commercial code have been highlighted, due to the scarce legal protection reserved for subjects who deal with traders.

In this broad context of "social pluralism", external laws are issued that can be defined as *exceptional*, as they do not threaten the definitive and completeness of the Code; but not yet *special*, if with this term we indicate the norms that regulate institutions unknown to the system of the Code, or to regulate categories of relationships in a different way.

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The First World War is the event that marks the break with the bourgeois age: the exceptional needs of the belligerent States require exceptional laws, aimed at achieving concrete results.

State can no longer stand on the sidelines. It interferes in the economy, limits the negotiating powers of individuals, becomes a contractor.

Special laws, dictated by the exceptional nature of the times, still appear to be an extemporaneous phenomenon. However, they are rapidly building another law alongside the Code, to protect needs unknown to the old system.

The Civil Code no longer represents the exclusive and unitary law of private individuals, but the *common* law, that is the discipline of broad and general cases.

1922 is the year of the march on Rome. Fascism, unable to disregard the reality of groups, intends to submit them to the control of the State, inserting them into its structures.

The fascist labor legislation is based on a corporatist choice. The corporate regime recognizes only one trade union with legal representation for each professional category. In compliance with the *Labor Charter* (Carta del Lavoro) of 1927, collective interests must prevail over private ones. The matter of labor comes under the competence of corporative law, as well as the matter of family, due to Lateran Pacts of 1929, comes under ecclesiastical law, thus assuming publicistic significance. In the 1930s, the term *property* is now associated with the term *function*: a concept which is also of a publicistic nature. The freedom to negotiate must be consistent with the importance of the economic operation, while the industrial enterprise has definitively assumed an administrative and managerial function.

The new Civil Code enters into force on April 21, year 1942, the anniversary of the birth of Rome (753 BC). The solemn date was to mark a special link between the

Twelve Tables and fascism. The most evident signs of the authoritarian regime are the compression of individual autonomy and State's intervention in economic relations.

However, the liberal legal training of the editors, scarcely inclined to identify programmatic lines and contents of fascist law, is already evident from the preliminary projects, which reflect the technical, aseptic and doctrinal character close to the formalistic tradition of Italian legal science. The jurists have been able to escape the grip of the regime by isolating the juridical phenomenon from the political one, focusing on the pure doctrine of law. With recourse to the *General principles of State's legal system* (Article 12, paragraph 2 of *Preliminary provisions*) and the prohibition of analogy of exceptional laws (Article 14, *Preliminary provisions*), the jurists' main intention was to reaffirm the ideological primacy of the Code.

The new Civil Code is divided into six Books. While the first two, respectively: *Of persons and family* and *Succession due to death and donations*, do not present particular changes compared to the previous legislation, the most significant changes concern the Third Book - *Of property*, due to the accentuated social function and for the more intense relationship between private and public interest; the Fourth Book - *Of obligations*, for the unification of private law and commercial law; the Fifth Book - *On labor*, which, in line with the 1927 *Charter*, addresses for the first time in a global vision the issue of labor's organic discipline, as well as of enterprises, companies, cooperatives, competition and unions. Finally, the Sixth Book - *On the protection of rights* gives a unitary meaning to the variegated matter of transcription, advertising, the non-contractual liability of the debtor, the compulsory realization of credit, prescription and forfeiture.

But the Italian juridical twentieth century is the time for a plural and factual law recovering after the period of bourgeois codification, which was under the banner of an exasperated subjectivism.

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After the Second World War and the end of the dictatorship, State becomes a "multi-class". The project of social democracy, founded on the equally essential character of civil, political and social rights, requires a fundamental legal norm. The Constitution of 1948, with its 139 articles, contains guiding juridical values for the entire Italian community. It is a pluralist text which, on the one hand, preserves the nineteenth-century heritage of liberties; on the other hand, opens to the influence of catholic and socialist ideologies. The individual is guaranteed not only in himself, but as a member of the intermediate groups that are placed between the public authorities and the community.

Civil liberties, the right to property, economic initiative, which in the nineteenth century received a guarantee exclusively in the Code, are now preserved by the

Constitution and, since 1956, by the Constitutional Court, which protects rights from the interference of public power.

The constitutional norms *of purpose* assign to the State goals to be pursued. Considering these principles, the law ceases to be instrumental in the interest of individuals, but has now programs to respect, controls to implement, interests worthy of protection to be selected. For example, about *economic initiative*, Article 41 affirms the criteria of social utility, security, human dignity, which ordinary law must guarantee; Article 42, by establishing the methods of purchase, enjoyment and limits of private property, reaffirms its social function.

Regardless of the technical variants between categories and types of norms, their common character is given by replacing the individual will, directing or limiting the decisions of individuals in the name of an economic order no longer left to free private initiative, but directed by law.

Of course, the law cannot abdicate its formal dimension. Two levels of legality must be observed: the codicistic one and the constitutional one, where the second expresses society in its core values. Unlike the abstract and general canons of action provided by the Code, it is the special law that takes on the character of concreteness.

Among the various categories of special laws to which reference can be made, the *mere conferral laws* grant advantages in consideration of activities already carried out, results already achieved, or in any case situations that already exist, regardless of their enactment. This category includes the *incentive laws*, through which State, on the promise of advantages, urges individuals to carry out certain activities that they would not perform or would perform differently from what is deemed useful for the collective interest. This is the case of *purpose loans*: loans granted with advantageous methods for the achievement of a purpose established by law. While the codified law assigns power to the private and arranges for its protection, the special law solicits its activity and supervises its exercise, but in the direction of a public purpose.

What happens if the matter is regulated by both Civil Code and special laws? The general principles should always be drawn from Civil Code. However, if the relationship of general law and special law arises from the comparison between two legal norms that have the factual element in common - the special norm adding to the broader case only an element of its own -, the laws that regulate extraneous matters to the Civil Code escape this classification. These are exclusive laws that the interpreter can apply by obtaining the general principles in the *analogia juris* (art. 12, paragraph 2, Civil code's *Preliminary dispositions*).

Concretely, special laws remove entire matters or groups of relationships from the discipline of Civil Code. Therefore, what have been defined as *microsystems* of rules are formed with their own and autonomous logics. Divorce, tenancy or employment relationships represent emblematic cases, matters that have consolidated into stable and autonomous bodies of law. This consolidation process calls into

question the Civil Code as a general law, relegating it to the discipline of residual hypotheses.

Special laws express organic principles that take on a general scope. A phase of conflict with the Code is followed by a phase of actual replacement to it. Therefore, the postwar period was defined as the age of *decoding*. According to the so-called phenomenon of sector disciplines, special laws become the statutes of groups of subjects within the broader civil society; they regulate entire classes of relationships and express general and autonomous principles.

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More than a general right, the Code represents almost a residual right with respect to norms. The social group, to which the individual has returned, becomes capable of guiding public power's choices through its own negotiating skills.

As mentioned, Civil Code is no longer the seat of guarantees for the individual: national law's unity is guaranteed by the rigid nature of the constitutional rules. Nor is the Code any longer the seat of the general principles, now expressed, for individual contexts, by external laws. Its loss of centrality in the system of sources corresponds to the end of juridical *monism*, which was typical of the nineteenth century. The twentieth century, of juridical *pluralism*, crumbles State power and its symbol. The exceptional law, which marks a temporary derogation from the codified principles, gradually acquires stability; around it, other laws are arranged that place new exceptions, in a micro-system of norms witnessing the tension between the social forces and the State.

Ultimately, the relationship between general law and residual law is reversed: general becomes the external law; residual remains the Code, with respect to which also the constitutional jurisprudence assumes the substantial role of source of law with the so-called interpretative and manipulative sentences.

The period from the end of the twentieth century to the present day is characterized by the primacy of economics over politics and law. Technological revolution, digital economy, financialization of markets are all elements of the so-called globalization. In Europe, since the Maastricht Treaty of 1992, the "open market" economy has produced a contraction of the public sphere. The managing State gives way to the regulator State. Modern business regulation requires control arbitration functions by independent administrative authorities.

In terms of personal rights, the issues of *bio-law* and *common goods* have restored vitality to the private categories. The discontinuity of public interventionism seems to be faced by a renewed primacy of private law.

It is therefore necessary to find a new unity of law. To this end, the Constitution has been adapted to the times. It introduced the mixed economy in Title III of the first part; it acknowledged the constraints of the EU legal system - from the free competition

of the Maastricht Treaty to the social economy of the Lisbon Treaty - in article 117 as amended in 2001 in the following parts: "*La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali";* and: *"Sono materie di legislazione concorrente quelle relative a: rapporti internazionali e con l'Unione europea delle Regioni*".

Furthermore, Constitution has contemplated the fiscal policy with the recent rewriting of article 81: "*Lo Stato assicura l'equilibrio tra le entrate e le spese del proprio bilancio, tenendo conto delle fasi avverse e delle fasi favorevoli del ciclo economico.*

Il ricorso all'indebitamento è consentito solo al fine di considerare gli effetti del ciclo economico e, previa autorizzazione delle Camere adottata a maggioranza assoluta dei rispettivi componenti, al verificarsi di eventi eccezionali".

It is evident that national budget discipline is related to Europe's control of the deficit and debt sustainability.

The constitutional dimension, with the table of fundamental rights acting as a harmonizer of the entire system, appears to be the only one capable of responding to the needs of the current pluralist democracy.

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Abstract: The report concerns the role of 1942's Italian Civil Code in the framework of the renewed constitutional principles. After the transition from fascism to the Republic and the consequent repeal of the more enhanced "regime" provisions in contrast with the new laws, the articles of the Code only have the function of indicating the legal scheme of contracts and obligations. The special laws become the instrument of implementation of the constitutional principles, with an impact on the new disciplines, partly substitutes, partly upsetting the structure of the Code in terms of work, property, economy. All these legal provisions converge to the issue of civil rights.

Keywords: Civil Code, Special laws, Constitution.