The principle of proportionality. A comparative approach from the Italian perspective.

Andrea Bortoluzzi
Abstract

The principle of proportionality in comparative law. A comparative approach from the Italian perspective

This Article traces the path taken by legal subjectivity in Italian law, through its deconstruction from the citizen to the consumer and then discusses the source of contractual disparity, which is a concept strongly influenced in Community law by the German conception of the contract. This “relational concept” calls for the contractual equilibrium achieved by the parties to be subject to a test to determine whether it complies with predetermined criteria of justice but restrictive measures may not impose excessive limits on the freedom of the individual and must therefore be based on the principle of reasonableness. The principle of proportionality, based on the three sub-principles of adequacy, necessity and proportionality, is the most appropriate judicial criterion for monitoring State intervention in the field of a coordinated economy and is common to the whole of European legal experience: it has entered by the indirect route through the concept of contractual imbalance in the field of domestic civil law, but it is also a principle inherent in administrative action. The monitoring of the unfairness of a clause by reason of a breach of the principle of proportionality becomes the ratio competentiae determined by each individual Member State’s law transposing Directive 93/13/EEC. The Article goes on to discuss the principle of proportionality and civil law and then to consider the contaminations of the principle in the directive.

The Article ends by looking at the application of the principle under consumer law in Italy, where the economic freedom of the seller or supplier in consumer contracts is subject not to State-imposed normative limits but rather to judicial assessment based on economic efficiency and compliance with the principles of fair dealing and trust (good faith).

Full article

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INTRODUCTION


INTRODUCTION
This paper has two aims. The first is to bring the legal principle of proportionality to the
attention of Italian jurists, reluctant to recognise principles as belonging to their own
system unless they are embedded in normative sources. I thus take the recent Consumer
Code as the basis for reviewing the content and application of the principle.

In the absence of a domestic tradition of proportionality evolved through doctrinal
debate, case law or usage within Italy, then, the second aim is to review the principle in
the light of comparative law, looking not only at the legal cultures closer to Italy’s such
as the German and French but also at concepts in common law, and the origins and
evolution of the concept there.

In so doing I highlight the universality of the principle of proportionality, permitting the
rapprochement of different legal cultures and circumventing the concept of uniformity
that often masks a desire for hegemony.

I start with the concept of citizens as a holders of equal rights and duties whose micro-
sovereignty is defined merely by the macro-sovereignty of the State. I find that their
capacity to exercise his will has been challenged by the idea of the fragility of other
subjects whose rights are to be safeguarded, with the introduction in Italy of new
procedures for support for the incapacitated. This has led to the protection of the weaker
party against unfairness and disparity in other spheres, evidenced in 2005 by the very
recent enactment of the Consumer Code, drawing not on Italian tradition, but merely
transposing Directive 93/13/EEC, itself strongly influenced by the German concept of
the contract rather than the French or, except in the matter of transparency, the English.
In Italy the spread of the concept of proportionality from public to private law has been
abrupt, in contrast to the gradual movement in Germany and France.

I then look at the application of the principle under consumer law in Italy, where the
economic freedom of seller or supplier in consumer contracts is subject not to State-
imposed normative limits but rather to judicial assessment based on a twofold criterion:
economic efficiency and compliance with the principles of fair dealing and trust (good
faith). A clause is lawful if it is adequate, necessary and proportional, in the
circumstances at the time and subject to the duty of disclosure of information.

I. THE PRINCIPLE OF PROPORTIONALITY IN COMPARATIVE LAW.

1. The paths of subjectivity. From the citizen to the consumer.

Why is it said that contractual disparity is an errant root?

Because the contract is an instrument used by persons in their ordinary activities.
The legal subject or person is the root of the contract.

And the concept of a legal subject today is no longer the concept that has come down
from modern tradition: the concept of a monolithic entity, firmly rooted in one land and
in its own unified source of law, the law of the State.
The single root of the legal subject of modern times that reflects the single tenet of an abstract capacity has gradually been deconstructed into a plurality of individualities and their multiple practical capacities.

In the same way, the single legal source producing the model of legal subjectivity has been deconstructed into a multiplicity of legal formative factors, corresponding to as many models of subjectivity.

Let us review this evolution in the light of the production of the sources.

A sovereign subject who exercises his power over the things in his ownership, in the sense of an extension of his subjectivity and his activity in a contract, in other words his freedom to determine what he wants and his capacity to enter into a binding undertaking having the force of law (article 1372 of the Civil Code, Effectiveness of the Contract), is a citizen and holder of equal rights and duties, to which he is entitled or which are incumbent upon him by reason of his birth in a given territory of a revolutionary State that has restored the codes of the 19th century. He then becomes an abstract subject, objectively denoted by his legal capacity, an abstract physical person whose micro-sovereignty is defined in relation to the macro-sovereignty of a legal person, the State; these two objective capacities have a single root, leading towards the reciprocal recognition of the relations embodied in modern codification of law.

Article 1 of the Italian Civil Code of 1865 and article 1 of Italy’s present Civil Code

The formative civil law source of the Civil Codes of 1865 and 1942, based on sovereignty and the exclusive relationship between the individual and the State, characterised by its absolute unified nature, can be deconstructed as the Constitution, which looks at the person in his many-faceted human aspects, guaranteeing his full personal fulfilment in intermediate formations of society and removing the economic and social obstacles by which he is limited: the model of this abstract capacity is embodied in individual capacities.

Articles 2 and 3 of the Italian Constitution

Here the root of subjectivity starts to wander: between the State and the citizen there emerges the idea of a civil society having intermediate social formations in which the legal person exercises his manifold capacities and demonstrates his social and individual plurality, promoted by the State through its recourse to solidarity, subsidiarity and the elimination of social and economic barriers.

For instance, the idea of subjectivity linked solely with the full capacity to exercise one’s will is starting to be challenged: the idea of fragility is making headway in the monolith of legal capacity, together with a multi-faceted legislative concept of that capacity.

The first result of this deconstruction of the constitution appeared in the Civil Code as amended following Law 6/2004. The purpose of that Law was to safeguard, with as few limitations as possible, the capacity to act of persons wholly or partially without autonomy in their performance of the functions of everyday life, and to introduce a body to administer the provision of support to such persons, the Istituto della Amministrazione del Sostegno. The legislature has not abandoned the legal concept of subjectivity based on the abstract creation of an ideal type of man, as a standard for denoting the capacity or incapacity of the legal subject, but it has admitted and regulated the idea that, without departing from that model, it is permissible to legitimise
the capacity of an individual subject by comparison with that model in the light of an evaluation of his natural (in)capacity.

This has created a sub-subject, the holder not of rights but of interests under private law, whose capacity as a person substantially unaccountable for his actions is determined by the court, provided that the rules are observed (article 404 of the Civil Code).\footnote{BORTOLUZZI, L’amministrazione di sostegno tra soggettività e negozio giuridico, VN, 2005, 3, 1686.}

The path taken in the deconstruction of legal subjectivity through the sources of law and regulations ends with the Codice del Consumo – the Consumer Code (Decree-Law 206 of 6 September 2005), which implements the principles laid down by the Italian Constitution (in its articles 2, 3 and 41) and by article 153 of the Treaty of the European Community. The Code transposes a series of directives for the protection of the consumer, whose legal status is defined there as that of “any natural physical person acting for purposes which are outside his trade, business or profession, who is granted and guaranteed the individual and collective rights and interests of consumers and users established by the law”. The consumer is a subject who lacks any territorial or social tie (there is no mention of the consumer having any duty), who is substantially without responsibility, and who is of course capable but of limited legal capacity: his capacity is expressed in negative terms, not as the “capacity of” but as the “incapacity of”, consisting not of the power to exercise his will but of his fragility – so much so that a consumer subject needs not only to be protected but to be “educated” in consumption in order to promote his awareness of his rights and interests, with particular reference to the most vulnerable categories of consumers (articles 2, 3 and 4 of the Consumer Code).

The extreme outcome in the process of deconstructing the legal subject is the natural subject on whose behalf no action is taken to promote individuality, uniformity, identification or hierarchy, with only the environment in which he may act being defined. The natural capacity of the consumer subject develops in “a technologically predefined environmental sphere”\footnote{FOCAULT, Nascita della biopolitica. Corso 1978-1979, Milan, 2005, 216.}

The situation is even more fantastic than in the imagination of Bruno Schulz, the mythologist of reality, in his essay entitled “the Republic of Dreams”.

The law gives a technological pre-definition of the market environment, foreshadowed by the vision of the future (we are back in 1931) projected by the Galician author. It is an environment depicted by Schulz in his “Street of Crocodiles”: “Reality is as thin as paper and betrays with all its cracks its imitative character. ... it is only the small section immediately before us that falls into the expected pointillistic picture of a city thoroughfare”. But this is an improvised masquerade that “is already disintegrating and, unable to endure, crumbles behind us into plaster and sawdust, into the lumber room of an enormous, empty theatre”. The consumer wandering down the Street of Crocodiles is a curious subject suspended midway between fear and desire. A very distant relation of abstract individuality, marked by the capacity to manifest the uncontaminated will of the legal subject. Citizen Schulz depicts his fragility as a consumer thus: “Nowhere as much as there do we feel threatened by possibilities, shaken by the nearness of fulfilment, pale and faint with the delightful rigidity of realisation”.\footnote{SCHULZ, The Cinnamon Shops – Le botteghe color cannella, Turin, 2001.}
2. Status and fair dealing. Contractual disparity as typical unfairness in consumer trading.

The root of contractual disparity lies in this wandering subject, whose sphere of action consists of the markets for the various goods and services that can be traded in predefined normative environments.

There are other spheres of action in the system, for legal subjects whose contracts may give rise to a hypothetical breach of what is known as the “congruity of trade”, or fair trading.

Within Italy, contracts between subjects who do not come into the category of consumers, when such an incongruity or unfairness occurs, offer the injured party the typical remedies of: rescission due to breach of contract under article 1448 of the Civil Code; termination of the contract in that it has become excessively onerous under article 1467; and annulment of the contract in the event of defects of will, error, threat and fraud under article 1427. There are also those atypical and residual contracts founded on the general clause of good faith at the time of their formation and performance, under articles 1337, 1336 and 1375, and those based on the standard of fair dealing under article 1175. In authoritative legal writing, guidelines have been mapped out for the application of these principles, and case law on legitimacy and merits has shown that the courts can manoeuvre the principle and the standards by applying either article 1418 or article 1419 to breaches of good faith and declaring the contract as a whole or individual clauses to be invalid.

Contracts stipulated by non-consumer subjects in cases of unfair trading in the transnational field offer, besides the remedies typical of the elected applicable law, the remedies typical of the lex mercatoria, such as “gross disparity” and “hardship” (article 3.10 and articles 6.2.1, 6.2.2 and 6.2.3, Unidroit principles).

“Gross disparity” occurs when the contract or one of its clauses gives one party an excessive advantage over the other, whatever the factor giving rise to it, so that it does not comply with ordinary criteria of fair dealing. There is “hardship” when the occurrence of events after entering into a contract, the risk of which has not been assumed by the disadvantaged party, alters the equilibrium of its performance.

“Freedom of contract remains a fundamental value, expressed by article 1.1 [of the Unidroit Principles – author’s note]; but it is a freedom that, under the lex mercatoria, has its limits in other values such as good faith and fair dealing in international trade, and the lex mercatoria reacts to non-observance of those values by the authoritative substitution of a fair contract for the contract entered into by the will of the parties”.

It is possible that the different spheres in which “fairness of dealing” is assessed and regulated on the basis of status, and therefore on a subjective basis, may lead to the determination of principles that are irritants in the various normative disciplines and/or usages.

There is no doubt, however, that this mutual “irritation” of the various disciplinary operating spheres may accentuate the divergencies rather than leading to uniformity of interpretation, according to the lessons learned from Gunther Teubner, who has studied the problem of the imposition in the European sphere of the principle of good faith.

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5 GALGANO, La globalisation nello specchio del diritto, Bologna, 2005.
contained in Directive 93/13/EEC of 5 April 1993 on unfair terms that, as we shall see, constitutes the “foundation” of the Italian domestic regulation of consumer affairs.\(^6\)

I feel I can safely say that the proper forum for the concept of “contractual disparity”, from the subjective viewpoint, is consumer law; in investigating its content and regulation the reference should be to its normative discipline\(^7\), not only as a matter of conviction as to interpretation but having regard to its normative placement – as we are about to discuss.

3. *The European paths of consumer regulations: the German roots of the concept of disparity.*

The errant root of the concept of contractual disparity is due not just to its subjective contractual profiles but also to the normative profiles.

Italian consumer regulations owe everything to Community law. Whereas in other European countries that are the inheritors of Roman law (Germany in particular) and in common law countries from the 1870s, the rights of consumers have been the subject of research and legislative measures, in Italy the first legislative provision on the subject dates no further back than to 15 January 1992, in the form of a transposition of Directive 85/577/EEC of 20 February 1985 to protect the consumer in respect of contracts negotiated away from business premises; the first manual of consumer law dates from 1995\(^8\).

The Consumer Code, then, has not drawn upon Italian domestic tradition acquired through doctrinal debate, case law, or usage; it transposes Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which defines an unfair term as one that “contrary to” (the Italian rendering – “*malgrado*” [despite] – is not faithful to the English, or to the French “*en dépit de*”, a good case of the lost and found in translation) the requirement of good faith, ... causes a significant imbalance in the parties' rights and obligations arising under the contract ...”.

This forms part of a broader picture of directives delineating Community consumer contract law, the transposition of which into Italian law has resulted in the recently issued Consumer Code. These directives aim to regulate the market as regards consumer acts, and tend to promote uniformity not so much as a legal discipline but rather relating to the effects of those acts within the market as a result of regulation.

It should be borne in mind that the text of the directive has been influenced by the institutional approach to the problem on the part of certain European countries, and that its application has in turn been modelled internally within the Member States by their different economic and legal systems.

The concept of contractual disparity as it emerges from the text of the directive is strongly influenced by the German conception of the contract.

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7. According to BOSETTI, in paper given to conference of the Consiglio Superiore della Magistratura, 9.10.2002

First and foremost, this is for the reason of matching the legal systems. The very idea of contractual disparity is hard to reconcile with the fundamentals of the French legal order and those of common law.

The French legal system is constructed on the supremacy of legislative rationality, and therefore on an absolute respect for the sovereignty of the people, expressed in the forms of the democratic procedure of the formation of law, allowing little scope for principles of a general nature, which are relegated to the ranks of remote testimonies to the moral bases of the law of antique times.

The common law system is based on a profound respect for the separation of powers, with law being seen as an expression of the particular historical reality of the social situation; in its construction there is a deep respect for the rights of the individual, founded not on law but on the limits imposed on legislative power, whose exercise is alien to any moral consideration (a greater “rebellious” impetus is contained in the State of the Union addresses in the United States, compared with the “revindicatory” nature of English bills).

Very different is the German system, founded on an institutional idea of the relationship between the State and the citizen, one that recognises the individual’s subjective rights as a power that the State grants the citizen to activate legal norms for his own individual advantage. Here subjective legal situations, corresponding to a recognised legal position, are protected through the exercise of jurisdiction by an impartial judge. In this context, general principles are raised to the status of the criteria of ordinary judgements, and the idea of equilibrium in the relations between the State and the citizen and between one citizen and another is an ordinary means of application of the law.

This analysis of the compatibility of legal systems with the concept of contractual disparity is reflected in the analysis of the principles governing the various conceptions of the contract within Europe. The *clausula rebus sic stantibus* in the German version (Wegfall der Geschäftsgrundlage) owes its origin to the power of the judge to modify the normative content of the contract in application of the principle of *Treu und Glauben* of section 242 of the *Bürgerliches Gesetzbuch* (BGB – the German Civil Code). “Treu” means “fair”, “Glauben” “trust”, and a principle such as this constitutes a standard of conduct by which the parties must abide in their behaviour and on the basis of which that behaviour may be judged. Over the past forty years, the most significant doctrinal and case-law application of this principle has been in the judicial monitoring of standard contracts. Section 9 of the 1976 law on standard contracts incorporates the developments of this type of contract to which judicial decisions have led, in that the courts have stated the principle that any contractual term of a standard contract is invalid if it unreasonably places the other party at a disadvantage, contrary to the principle of objective good faith. French law is not like this: the remedies for unfair trading are the same as the “typical” remedies of the Italian Civil Code listed above (remedies for mistake, threat and fraud, rescission due to injury, non-performance due to force majeure). But a significant contractual disparity, either in its negotiation or in its performance, does not have the power to detract from the cogent force of contractual obligations (article 1134(1) of the French Civil Code). “*Qui dit contractuel dit juste*” – “He who says that it is contractually agreed says that it is fair” – runs a maxim attributed to Fouillée by François Terrier. And to René Demogue, who highlights the

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9 **Nocilla, Introduction to Jellinek, La dichiarazione dei diritti dell’uomo e del cittadino, Milan, 2002**
cooperative nature of the contract, Jean Carbonnier replies “future commentators will be surprised that, at a time when marriage has perhaps been transformed too much into a contract, there a people who dream of transforming all contracts into a marriage”.

And not even English law recognises a general duty of fair dealing, taking as its assumption that all those who operate on the market are sophisticated agents. The role of the courts is to confer the force of law on contracts even if they are unbalanced or weighed in favour of one of the parties, or if events not foreseen in the contract favour one party in a manner not predicted at the time of entering into that contract. According to Lord Ackner, “the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. ... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.” [Walford v. Miles, 1992, AC 128, 138 (the rest of the Court agreed)]. In short, the negotiation of a contract, its performance and its infringement take place in a context in which it is permitted by law to be tough and unpleasant, since the parties can be released from the obligation of any considerate or proper behaviour.  

A comparative economic micro-analysis based on the institutional foundations of the different models of capitalism in Europe reinforces this idea. To go by the economic textbooks, the “classic” contract inherent in liberal economies is the one of English and American inspiration, while the “relational” contract of coordinated economies is first and foremost of German inspiration. The relational contract implies a judgement of fair dealing on the contract, which is based on balancing the powers of the parties to the contract and requires the courts to assess the extent to which such a power has influenced the apportionment of the risks between the parties themselves. This does not happen with the classic contract, which requires the judge to ensure that the contractual deal as devised by the parties has been performed.

The concept of contractual disparity of Directive 93/13/EEC, then, hails from the German legal tradition, even though – as we shall see – it has a common foundation in a principle that belongs to all judicial civilisations in the Roman law and common law tradition and has been subject to certain influences derived from the French and English-speaking world.

4. The normative foundation of the concept of disparity: the principle of proportionality and Directive 93/13/EEC.

What are the legal bases for the concept of contractual disparity?

Whereas the classic concept of the contract hinges on the autonomy of the parties, and the very concept of contractual disparity is extraneous since every contract is the result of an equilibrium achieved in a given context, the relational concept – although autonomy is respected – calls for the contractual equilibrium achieved by the parties to

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be subject to a test to determine whether it complies with predetermined criteria of justice.

According to these criteria of justice, the task of protecting market agents from legislative or administrative acts that might restrict their right of economic freedom is entrusted to the decision of the court, which assesses their fairness in the light of the aims pursued. In countries with a coordinated economy such as Germany, legislative and administrative activity is subject to the control of the Constitutional Court, pursuant to the unwritten constitutional principle applicable not only to the legislature but also to the judicial and executive authorities, going under the name of the “principle of proportionality” (Verhältnismassigkeit): the principle that any restriction of individual liberty must be appropriate to the attainment of the objectives to be achieved. Restrictive measures may not impose excessive limits on the freedom of the individual and must therefore be based on the principle of reasonableness. The principle of proportionality is regarded as the most appropriate judicial criterion for monitoring State intervention in the field of a coordinated economy. Since economic rights are vital to the realisation of the social State in all liberal democracies, the principle of proportionality in this context ensures that when the public authorities attempt to restrict or qualify economic freedom they will not be authorised to do so if their measures are manifestly disproportionate to what is required in order to achieve the desired ends. From an economic viewpoint, the rule implies the deployment of two concepts, which are regarded as basic within coordinated economies of democratic inspiration. The first is that the authority’s intervention must be subsidiary in nature. The second is that State intervention and the protection of individual freedom of action must form part of a unified strategic design. The principle of proportionality is applied in the light of three sub-principles: adequacy (a measure is adequate for the attainment of the preset objective if the desired result can be achieved only by recourse to that measure), necessity (a measure is lawful on condition that a less restrictive measure does not exist in order to pursue the legitimate objective) and proportionality in the strict sense of the term (the gravity of the intervention and the gravity of the reasons justifying it must be proportionate one to another).\(^{12}\)

This principle belongs to the regulatory tradition of German public law, according to which it was first devised (it was the Prussian Supreme Court that established the principle in the field of police law in its Decision 9 of 14 June 1882, PROVG 353 – Georg Jellinek’s comment was that “the police may not kill a swallow with a cannon”) – and it has been a thread running throughout the historical development of that law. The principle was adopted by Community law, both at institutional level in article 5 of the Treaty (“Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”) and at jurisprudential level (the principle has been applied in over five hundred cases before the European Courts of Justice). It is also explicitly stated in article 52 of the Charter of Fundamental Rights and in article 1-11 of the European Constitution. And it is directly included, via the directive, as the criterion of election in setting the boundaries of the consumer contract, with the intention of promoting the scope of action for both enterprises and consumers as regards negotiation, a process that is inefficient by its nature because of the asymmetrical exchange of information between the seller or supplier and the consumer in their trading.

These boundaries are arrived at by submitting the interests of the parties to selection based on the criteria of balancing those interests, i.e. the criteria inherent in the relational contractual system under which the parties’ autonomy is also subject to screening based on collective interests. Contractual disparity assumes the character of “significantness” as stated by article 3 of the directive on unfair terms, according to the definition that we are provided by the German version of the text of the directive, in other words where the clause reads “erhebliches und ungerechtfertigtes Missverhältnis”, in other words where the contractual disparity causes a “considerable and unjustified disproportion” between the rights and obligations of the parties. The terms “significativo”, “significant” and “importante” in the Italian, English and Spanish texts seem to lack any legal semantic content. To the interpreter of the text, that content is offered by the German text.

The “considerable and unjustified” disproportion should not be assessed in the light of the French system which, in incorporating the principle of proportionality, turns it into an application of the mathematical/remuneration type according to the “bilan-coût-avantages” doctrine, leaving it to the doctrine of “erreur manifeste” to justify intervention at the discretion of the judge, in other words in a rigidly objective manner, but in the light of the principle of good faith mentioned here, not so much in the technical sense but as something introducing a subjective element in determining whether there has been a departure from the principle

Recourse to good faith means that the judicial body needs to assess not only the force of the parties’ respective positions but also their behaviour.

This moderates the purely remunerative and utilitarian criterion of proportionality in the strict sense of the term, through the sub-principles that have just been listed. The principle of proportionality, to use the language of the expert in civil law, should not therefore be confused with the abuse of law, which Rodolfo Sacco declares as corresponding to the principle of good faith, masquerading for reasons of nominalism in order to defend the system in the French field, and used there as a criterion for the selection of contractual equilibrium. Nor should it be confused with equity in the sense of a remedy for disproportion between performances as in the German field, being merely remunerative in character, mentioned by Mengoni as a standard to be used at the time of application of the directive on unfair terms.

Here a criterion of utilitarian evaluation is applied [the disproportion between performances having regard to the object of the contract, in the sense of a legal fact, the object as an undertaking that has subjectively been entered into, as described by Alberto Trabucchi]. This resorts to a retributive concept of justice – i.e. “if” this happens, “then” that will follow – tempered by an ethical criterion of social origin having a

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14 Light is shed on the retributory value of proportionality by Hans Kelsen when he comments “the relationship between action and reaction in the norm of justice of retribution is not equality, but proportionality”. KELSEN, Il problema della giustizia, Turin, 1960.
constitutional legal significance, the criterion of good faith (understood here as “solidarity” or “subsidiarity”) – i.e. “if ... then ... on condition that ...”. In short, there seems to have been a deliberate intention to avoid founding the deterrence of unfair terms solely on discretionary jurisprudential control, based on the application of the principle of Treu und Glauben, in view of the lively resistance from the French system and common law, now and before, to the application of the principle (it is no coincidence that the French transposition law has not included the principle of good faith in article 132-1 of its consumer law), relying on the principle of proportionality in the German acceptance of the concept.

The monitoring of the unfairness of a clause by reason of a breach of the principle of proportionality, usually exercised by the court of judicial review in Germany (the Federal Constitutional Court) or by the supreme administrative body (the Conseil d’État) in France as regards administrative measures and laws (and in Germany as regards jurisdictional measures as well, as we have seen), becomes – by reason of the body called upon to judge the consumer contract on the direct basis of the content of that contract – the ratio competentiae determined by each individual Member State’s law transposing the directive.

5. **Principle of proportionality and civil law.**

Let not the idea that a concept belonging to the public law should penetrate private law cause scandal.

The scandal is caused by those who do not perceive that market regulation has prevailed over direct regulation, that the economic policy of the Community and of the individual Member States is no longer directed towards combating inequalities in the name of social justice but rather towards exclusion, in that it diminishes the competitive capacity of members of society, allowing some people not to be affected by competition.

Thus, according to this approach, the legislative enforcement of the contract is achieved not through the normalisation of legal subjects but by action on the environment. The aim, therefore, is to change the rules of the game but not to alter the mentality of the players.

Economic public order, which is still being flaunted as the inspiring principle for legal action and implementation in this field, formerly the Sacred Bull of imperative law, has today become the lapdog of State-assisted market self-regulation, of suppletory – i.e. “default” – rules.

In this way, the idea that the principle of proportionality can be considered a general transversal principle “that corresponds to a logic applicable to all legal systems and to all the disciplines of law” is not regarded as eccentric, and nor is the idea that the principle exists in private law, since “it is not logically or technically impossible to extend that principle”.

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18 FOCAULT, op. cit.; J. DONZELOT, Refonder la cohésion sociale, Esprit, 2006, 12.
19 POILLOT, op. cit.
We know, moreover, that according to German doctrine the theory of subjective rights originates within the sphere of public law and the protection of the consumer from unfair terms is achieved by means of protecting legally relevant situations, classified haphazardly as “rights” or “interests”, both terms conspiring to espouse the idea of a “legitimate interest of private law”. Indeed, the competence to give a prior judgment as to the unfairness of a clause was, at the time of first transposing the directive into French law, directly delegated to the executive authority by identifying those unfair clauses through recourse to taxonomic typification, adopted by the imperative route.

This was not the experience in Italy, where the concept of contractual disparity and therefore the principle of proportionality entered straight into private law, being included directly in the text of the Civil Code as article 1469 bis, following the law transposing the directive on unfair terms (Law 52 of 6 February 1996), and still today it has found its stable home in the new text of article 1469 bis (further to the issue of the Consumer Code), which explicitly derogates from the provisions on contracts in general whenever the Consumer Code provides otherwise and contains provisions that are more favourable to the consumer.


The normative root of contractual disparity, as has been made clear up to this point, seems to contrast with the errant root of its juridical existence. But this is not so.

This is not only because – as we have just pointed out, albeit from a different angle from the Germanic – the principle of proportionality also belongs to the French tradition: it is not unknown to the English system [in the opinion delivered by Lord Steyn in the case of Regina v. Secretary of State for the Home Department, 23.5.2001(2001) UKHL 26, he states that “The contours of the principle of proportionality are familiar” (to English law – author’s note). He recalls the opinion of Lord Clyde in the case of de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing, in which Lord Clyde observed that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: “whether: (i) the legislative objective is sufficiently important to

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21 **JELLINEK, op. cit.;** assessments in the German-speaking field, for the *reductio ad unum* of subjective law and objective law in KELEN, *Zur Lehre vom öffentlichen Rechtsgeschäft*, *Archiv des öffentlichen Rechts*, 1913, 53-98, 190-249, following on WEYR, *Zur problem eines einheitlichen Rechtsystem*, *Archiv des öffentlichen recht*, 1908, 53-98, 190-249.

22 The concept of an interest of private law has been explored by an Italian jurist, who defines it as a substantive situation of advantage (because it is directed towards achieving, on the substantive level, a favourable result which may consist, depending on the circumstances, of preserving or modifying – and therefore also extinguishing – a given legal reality), an inactive advantage (in that it is also directly protected as a substantive advantage, its satisfaction does not depend on the conduct of the subject aspiring to it – absence of *agere licere* — but on the conduct of a different subject, the holder of a situation of right or duty, *rectius potestà*).


Regarding the consumer subject, the term of the “substantive situation of partially active advantage” might be used, in that the *agere licere* is subject to the protection of trust in the consumer by the supplier or seller, as we shall see in greater detail later on in this paper.
justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.” [1999] 1 Ac 69.

It bears a relationship with the United States doctrine of the “less restrictive alternative” (the aim, in assessing the compatibility of the legislation of a state with federal law, of weighing whether the interest of the state, however legitimate, may be pursued by a measure less injurious to free trading than the measure currently adopted).

But it is also because the directive operates a sets of balances between objective and subjective principles inspired by different legal systems.

The reference to the individual negotiation of the term (article 3) as a factor offering a release from assessment of its unfairness relies on the conventional root of the contract that is common to all legal stems derived from Roman law\(^23\).

The reference to the context and situation at the time of interpretation of the term (article 4), too, in other words the reference not only to the letter of the contract but also to the pre-contractual and performance phases, belongs to the Roman law tradition, the emphasis being placed more heavily on the German and Italian acceptance\(^24\).

The lengthy list of unfair terms set out in the Annex to the Directive seems to pay tribute to the French tradition, which is reluctant to manoeuvre principles, to counterbalance the reference to pre-contractual good faith taken as a criterion supplementing the assessment of disparity. It seems that the reference to transparency of terms in article 5 may be related either to the obligation to furnish information, used by French doctrine and jurisprudence as a principle designed to restore the balance of an unfair bargain, and regarded as a criterion in the application of the principle of proportionality up to the point at which the contract is formed, defined as a “proportion between the information available to the seller or supplier and the information that ought to be provided to the consumer”, since in this case the unfairness of the term must be assessed in the light of the failure to meet the requirement of transparency at the time of entering into the contract, something that can be used to verify not only the quantity but also the quality of the information provided\(^25\).

The transparency invoked in article 5 can also be readily attributed to the English legal tradition, more specifically the principle of disclosure seen in relation to the principle of unconscionability, i.e. the principle that feebleness of understanding, albeit not amounting to insanity, when associated with the circumstance of fraud is also in the nature of an unconscionable bargain. In other words, the exerting of undue influence, the absence of good motive and so on are grounds for the avoidance of the contract, especially in courts of equity. Unconscionability operates not only with regard to the buyer’s bargaining weakness but is also based on the substantive iniquity of the contract, on disparity between the price of the good that is the subject of the contract and its market price and, lastly, on its eversiveness when measured against community standards\(^26\), where the contract is invalidated of it is “so unconscionable as no man in

\(^{23}\) BORTOLUZZI, Umanizzazione del contratto, in Forma e mercato, Turin, 2000

\(^{24}\) IRTI, Testo e contesto, Padua, 1996

\(^{25}\) POILLOT, op. cit., 144.

\(^{26}\) WHITTAKER-ZIMMERMAN, op. cit., 44. In the case of Earl of Chesterfield v. Janssen [2Ves. Sr. 125, 28 Eng. rep. 82, 100].
his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”.

II. THE PRINCIPLE OF PROPORTIONALITY IN APPLICATION.

7. Paternalism, the public economic order and the principle of proportionality.

The principle of proportionality, therefore, is common to the whole of European legal experience.

As we have pointed out, it has entered by the indirect route through the concept of contractual imbalance in the field of domestic civil law, but it is also a principle inherent in administrative action (as in article 1(1) of Italian Law 241/1990, which lays down the principles of administrative action by stating that the principles of Community law are directly applicable); in the decisions of the Constitutional Court, reasonableness is used as the most stringent criterion in the protection of subjective rights against public interference. The foundation for both the principles is in article 3 of the Constitution.

If one looks at the other aspect, application, it is a principle that may be seen in what may appear to be contradictory ways.

It is, in other words, like a criterion of antipaternalistic justice, one that can be used by a State that regards each subject like a player on the market and intervenes only in the environment it which it is entitled to play, allowing the subject to pursue his simple individual egoistic interest as a multiplier.

But it is also like a model of paternalism in the economic field, the aim being to counteract failures on the consumer market by creating the effective protection of consumers. It has been said in this respect that the principle is apt to stand guarantor for the respect of the consumer’s rights, having regard to the social aspects implied by consumerism, by recourse to the concept – not a State but a European concept – of public economic order.

The errant root of contractual disparity, in my opinion, leads us away from the issue of paternalism/antipaternalism associated with the idea of sovereignty.

Forming part of consumer law, as it is, it defines the subjects involved as economic, not legal, subjects.

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27 The principle is widely applied in the United States, where it is governed by the Uniform Commercial Code, paragraph 2-302, in the book devoted to sales. According to Lawrence Rosen, the principle does not belong to English tradition but was introduced by a practice of the Cheyenne Indians, the “crucible of conflict”. ROSEN, Law as culture, Princeton, 2006.

28 Apart from German, French and English legal experience, the principle is common to the experience of Belgium, the Netherlands, Austria, Switzerland and Finland. See SANDULLI, “Proporzionalità”, in Dizionario di diritto pubblico, ed. Cassese, Milan, 2006, 4644.

29 POILLOT, op. cit., 158. The issue of paternalism and antipaternalism in civil law has recently been surveyed by CATERINA, Paternalismo e antipaternalismo in diritto privato, RDC, 2005, 6, 771 ff
These are, then, subjects of interest, attracted to the legal sphere by the contract because of its binding nature based on a utilitarian calculation.

There is an interest in the value generated by the economic bargain being perpetuated through the trust generated by certainty and by the stability of relationships. There is an economic interest and legal will: the subject of interest and the subject of law cohabit but do not substitute each other. The legal subject does not obey the same logic as the subject of interest. The former is defined by the renunciation and negative exercise of his freedom; he sees his rights affirmed in the abstract, but he makes them malleable for the practical exercise of state sovereignty. The latter is dissociated from any negative idea of freedom, and his positive and unopposed action is deployed mechanically, motivated by egoism. The economic subject poses no limits to sovereign power, but causes it to lapse. The State is incapable of dominating the totality of the economic environment. The exercise of sovereignty in consumer field lies not in the possession of an absolute power but in supervising the economic process and performing a function of control, of incessant and integral monitoring of that process.

The idea of the rationality of government is founded not on the rationality of the sovereign individual but on the rationality of those who are governed, as subjects of interest. It is, then, the rationality of the governed that must serve as a regulating principle for the rationality of the government.

The principle of proportionality assumes the task of marrying the rationality of the subject of interest and government rationality, based on the former.

The concept of paternalism inherent in the legal relationship between the legal subject and the State is therefore extraneous to the principle, but the concept of a spontaneous remedy to the disparity that the supervisory sovereign body determines in the exercise of its function is identical in nature, expelling the unfair term from the sphere that it supervises. In this perspective, the concept of public economic order is superseded. One passes from the field of the imperative to that of retribution by recourse to the principle of proportionality, which permits the behaviour of the subject of interest to be regarded as lawful on condition that it satisfies the principle. It is implemented in the field of “yes”, of freedom of choice, and not in the field of “no” and the prohibiting of choice.


Let us look at Italian consumer law with the eyes of one who is called upon to apply it. The State does not place limits on the exercise of economic activity in the consumer field, such limits being instrumental to the realisation of social protection (in application of the principles of solidarity and subsidiarity) by recourse to administrative or legislative acts, which are subject to a review in the light of the principles of proportionality and reasonableness by the constitutional judge. The economic freedom

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30 The relations between the subject of interest and the subject of law and their sovereign roots are investigated here according to FOUCAULT, op. cit., 194-258.
31 Freedom of choice dissimulates the obligation of choice. The market system makes the stern injunctions of reality seem like the exercise of freedom and an act of self-affirmation. The punishment is manifested not as repression but as the effect of a false step or a missed opportunity. See BAUMAN, Lo sciente inquieto. Dell’uomo politicus all’homo consumens, in idem, Homo consumens, Trent, 2006.
of the seller or supplier with regard to consumer contracts is not subject to normative
limits imposed by the State. It is an open playing field: it is the selling to the consumer
by the seller or supplier, regulated by the latter through the standardisation of contracts,
that is subject to an assessment of the principle of “proportionality of good faith”.

That assessment falls within the competence of the judge (and, where he is required to
act, the notary). The decision is based on a twofold criterion: economic efficiency
(coming within the sphere of autonomy) and compliance with the principles of fair
dealing and trust (good faith).

The first criterion, that of economic efficiency, should be matched by compliance with
the principles of adequacy and necessity in the light of significant disparity (article 33
of the Consumer Code), in the sense of substantial and unjustified disproportion
according to the German-influenced interpretation that we prefer. The idea is that one of
the steps towards achieving consumer protection and market safeguards is to eliminate
the inefficient contractual clause. Such a term takes the form of an undue restriction of
competition by the seller or supplier and of depriving the consumer of freedom of
choice. Seen in the context of the contract, the term clause should be performed within
the framework of its content (in the light of a detailed appreciation of the
proportionality of the parties’ rights and obligations) and is lawful on three conditions:
that it is adequate for the attainment of the entrepreneur’s interest in that it could be
pursued only by recourse to that term; that it is necessary, in other words that no other
measure exists that would pursue the interest of the seller or supplier but would be less
restrictive of the consumer’s interest; that it is proportional in the strict sense of the
word, in other words it is such that there must be an adequate proportion between the
choice of limiting the consumer’s interest and the gravity of the reasons justifying that
choice.

The respective sub-principles should not be weighed mechanically, merely in the light
of their economic efficiency, nor should the assessment be confined to an analysis of
the costs and benefits of the clause, and still less should the objective be an equitable
reduction of the disproportion having regard to the economic content of that clause; but
rather their evaluation should be founded on the second of the criteria stated above, i.e.
respect for the principles of fair dealing and trust, by evaluating the provision set out in
the clause in compliance with the principle of good faith. An evaluation of this kind will
be conducted on the basis of the performance of the duty of fair dealing (article 1175 of
the Civil Code) in the case examined, having regard to the conduct of the parties at the
time of negotiation (“the circumstances existing at the time of its conclusion” – article
34 of the Consumer Code) and to whether the seller or supplier has duly complied with
its duty of information (articles 34(2) and 35(1) of the Consumer Code), as well as
having regard to the tenets of interpretation, not just according to the letter of the law
but taking account of the relations and situations, applying the principle of interpretation
contra proferentem where aspects of the clause are open to different
interpretations. At this point, of particular importance is a concept of good faith based
on both objective and subjective tenets, good faith being taken to be the criterion for
protecting the trust of the weaker party.

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32 The suggestion comes from POILLOT, op. cit., p. 145: “European consumer law fluctuates
between the objective and the subjective appreciation of the disproportion between the
parties’ rights and obligations and therefore also between a subjective and an objective
acceptance of the contractual equilibrium”.
In this way, the objective quantity of information must be commensurate with its subjective quality; in other words, one needs to look not only at its typographical but at its cognitive intelligibility. In this way, the first factor in an evaluation of the behaviour of each party will be not so much the objective consideration of whether the behaviour is in accordance with the standards sought by those forming the contracts, but with the actual physical status of the relations between the subjects involved, bearing in mind the findings of heuristic and cognitive science. In this way, the objective literal nature of the clause must be commensurate with the relational context (the relations between the subjects involved) and the situational context (the context of space and time) within which the contract has been concluded.

Thus it is that in case law, a clause in a contract drawn up by a leasing company to the effect that it was released from liability for failure to consign the movable asset being leased, whereas the user was deemed to be required to pay the lease rentals irrespective of whether it actually used that asset, was declared by the court to be unfair, not just because of its evaluation of the criterion of economic efficiency as compared with the principle of proportionality but also in the light of the principle of fair dealing. The court held that the conduct of the leasing company in this case had been opportunistic, taking into account a set of circumstances such as subterfuge practised on the user by the supplier of the asset, the fact that the contract had been entered into not because of the user’s manifest need but rather for the financial convenience of the transaction put forward by the supplier, who had not been approached with a view to supplying the machinery but had presented himself at the user’s office proposing its “lease purchase”, and the overconfidence of the user in entering the leasing agreement, seeing it as an instrument incidental to acquiring immediate possession of the asset.

Thus it is, again, that the quality of the information provided, the subject of an atypical contract reached between an intermediary known as the estate agent and a party offering and a party accepting what is called a “promise to purchase”, was considered to be a determining factor in the decision on the intermediary’s breach of the contract when the transaction failed to materialise for a reason attributable to him as a result of the absence of quality of that information. “The contract was not finalised, this also being the responsibility – pursuant to article 1218 of the Civil Code – of the intermediary who had provided information under the contract of mediation, which, rather than bearing the imprint of transparency – i.e. being true ... bore the imprint of opacity – i.e. was false – .” This meant that he could not in any case claim a commission on the grounds of securing a “contact” according to the wording of a clause in the form that he himself had drawn up. This was because “in the negotiation of contracts by means of standard forms, the principles of transparency and good faith, in that they are objective criteria of the intermediary’s guarantee and his resulting acceptance of responsibility, underpin the intermediary’s negotiation”, the whole being commensurate “with the characteristics of the contractual relationship of mediation that are based on intuitu personae and the consumer’s confidence in the provider of the service”. The preliminary contract to

33 CATERINA, op. cit., draws the reader’s attention to the work that has been done in behavioural law and economics, with the emphasis on the branch of research on heuristics (simplified decision-making strategies) and biases (systematic errors due to cognitive illusions), and in particular on the behaviour of “overconfidence”.

34 “Opportunistic conduct” is the definition used in law and economics to define our concept of fair dealing. See Williamson, The economic institutions of capitalism, New York, 1985, 47 ff.

which the preparatory negotiation, i.e. the exchange of information between the parties concerned, should have led could not be stipulated due to the absence of a decree as to the fitness for use of the building of which the unit being negotiated formed part; this, then, matched the profile of a sale *aliud pro alio*, especially bearing in mind that the reason for no decree having been issued was that an allegedly major building offence had been committed, on the grounds of which the authorities could have required the unauthorised building works to be demolished\(^{36}\).

9. \textit{Qui dit proportionnel dit injuste?}

The root of contractual disparity, therefore, is errant.

Franz Rosenzweig\(^{37}\) has written of redemption, formerly achieved through the example of the beacon of light from the cross firmly rooted in the soil, now attained by the example of the light of the wandering star that every natural man, who has become detached from that soil, carries within himself. The errant root, the messianic and liberating oxymoron describing that man, here becomes a nihilistic oxymoron. For such a person, any metaphor is valid if it achieves the goal of making the field of play practicable, making the inefficiencies to which the consumer contract, due its asymmetric nature, gives rise on the market, lawful in the eyes of justice, making consumers play in the mud of externality. It is a way like any other of applying to the market not the rules of the rationality but the rules of Darwinian selection. We are content with a virtuosity that has been defined as “qualified consequentialism”\(^{38}\), a blend of utilitarian consequentialism and deontological contractualism.

There must be a choice between bad externalities and good externalities. To speak of the internalisation of costs is taboo. It would mean having man return to the path of messianism, the idea of a sovereignty that has no longer renders unto Caesar that which is Caesar’s but does not disclaim paternal sovereignty\(^{39}\). We trust we may for a moment

\(^{36}\) Court of Busto Arsizio judgment 320, 26.3.2002 (unpublished). The judgment stated that the intermediary was also responsible for a breach of the obligation of protection, arising from the objective trust placed in him by virtue of his status as a professional entrepreneur, pursuant to article 1176(2) of the Civil Code. On the subject of the principle of transparency, it recalled the origin of the blue sky laws on which the US concept of transparency was founded: these laws were motivated by the need to regulate the conduct of fly-by-night property brokers who would sell plots of land that could not be used by their purchasers – “it was stated that they would sell building lots in the blue sky in fee simple”.


\(^{38}\) MULLENDER, \textit{Liberal tolerance, the proportionality principle, and qualified consequentialism}, Newcastle Law School working papers, 2000/2004 (accessible at www.ncl.ac.uk/nuls/research/wpapers/mullender1.html).

\(^{39}\) An alternative to the messianic perspective, albeit no less “exaggerated” for the law, is the approach belonging to the Marxian orthodoxy of MATTEI-NICOLA, \textit{A “social dimension” in European Private Law? The Call for setting a Progressive Agenda}, Global Jurist, 7 [2007], Iss.1, (Frontiers), Article 2.
look outside the text but within the context by returning to Schulz and his “Cinnamon Shops”, in which he gives such a masterly description of the errant experience of a sovereignty detached from spatial ties: “We lived on Market Square, in one of those dark houses with empty, blind facades, so difficult to distinguish one from the other. This gave endless possibilities for mistakes. For, once you had entered the wrong doorway and set foot on the wrong staircase, you were liable to find yourself in a real labyrinth of unfamiliar apartments and balconies, with unexpected doors opening onto strange empty courtyards, and so we forgot the original purpose of our expedition, only to recall it days later after many tortuous deviations and strange adventures when, filled with remorse, we regained the paternal home in the grey light of dawn.”.

This is a reading that strips bare the action of man in his multi-universe, and therefore the action of the jurist, an action that is truly too much for law.

Let us then end with an affirmation and a provocative question.

Would the werewolves of disparity be preferable to the werewolves in sheep’s clothing that roam in the principle of proportionality?