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The State of Exception in Private Law

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TABLE OF CONTENTS

Introduction

The rule and the Exception: Situating Exception in Private Law

The exception is a great paradox confronted by Law[1]. In every rule, there is an exception that destabilizes the system but allows external influxes escaping the governing Law to accommodate changes[2]. The Law is born from its contrary, from the necessity to introject the outside within the juridical order. For murder, the Law does not set forth "one shall not kill." Instead, it imposes a sentence for those incurred in the legal precept[3].

Transposing the crude nature of rules to Private Law, interpolation, synecdoche, and exceptions correspond to legitimizing contradictions and recognizing a never-settled paradigm[4]. Justinian compilators interpolated classical sources to fulfill void spaces built over centuries[5].

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1 Among the main sources on the exception see: Benjamin, Walter. "Il dramma Barocco Tedesco". *Opere Complete, II. Scritti 1923-1927*, edited by Enrico Ganni. Einaudi, p. 69-268. p. 105: "*La mentalità giuridico-teologica che contraddistingue l'intero secolo esprime quella tensione irrisolta verso la trascendenza che sta alla base del Barocco storico della Restaurazione si contrappone frontalmente, nel Barocco, l'idea di catastrofe. E proprio su questa antitesi viene coniata la teoria dello stato d'eccezione. Così, se si vuole spiegare come mai 'la viva coscienza del significato del caso eccezionale, che domina il giusnaturalismo del XVII secolo', vada in seguito perduta, non sarà sufficiente chiamare in causa la maggiore stabilità politica del secolo successivo. Se infatti, 'per Kant…il diritto d'eccezione non è più affatto un diritto', ciò dipende dal suo razionalismo teologico*." For a focus on the sanitary exception following the Covid-19 pandemic, see: Abriani, Niccolò; Caselli, Gian Carlo; Celotto, Alfonso; Marzio, Fabrizio Di; Masini, Stefano; Tremonti, Giulio. *Il Diritto e l'eccezione: stress economico in tempi di emergenza*. Donzelli editore, 2020. p. 3: "*Stiamo entrando in una terra dove è già ora difficile, ma sarà sempre più difficile definire il confine tra prima e dopo, tra vecchio e nuovo, il confine politico e giuridico tra regole ed eccezioni, come è nel titolo di questo volume*."

2 De Visscher, Fernand. *Pactes et religio*. *Revue Juridique Trimestrielle Archives de Droit Privé*. Editions Jean N. Zacharopoulos, 1953. p. 138-150 : *« Nuda pactio ou nudum pactum s'oppose au contrat formel de stipulation. C'est donc par un défaut de forme qu'ils tentent de justifier la règle. Mais cette justification est singulièrement incomplète et boîteuse. Le défaut de forme explique sans doute l'absence d'obligation ou d'action civile. C'est l'aspect négatif du problème. »*

3 Among few examples are Section 575 of the Italian Penal Code; German Penal Code Chapter 16 on offences against life, Section I; article 221-1 and ss. In the 1994 French Criminal Code.

4 Kuhn, Thomas. *The Structure of Scientific Revolutions*, 3rd ed. Chicago University Press, 1996. p. 35 and ss. As stated by Kuhn, for a paradigm shift, some events must concur, especially the exposure for receiving change in a given time, as what happened to the latter called the photoelectric effect, understood as mere facts until the science of developed enough to relate previously unrelated laws of physics.

5 Watson, Alan. "Prolegomena to establishing pre-Justinianic texts". *Tijdschrift voor Rechtsgeschiedenis*, 1994, vol. 62, p. 113.

In the modern era[6], legislators behind the enactment of legal codes confined incongruences through metonymic processes[7], even if doctrinal developments ultimately conduced to the erosion of an apparent cohesion[8]. At the apex of legal positivism, legal theorists upheld the system's harmony, logic, and coherence of legal precepts. Antinomies were to be eliminated, commands obeyed[9], and the law articulated within such boundaries.

Despite the multiple attempts to forge an apparent inescapability of normative solutions, deconstructive projects swallowed the legal system's linearity exposing numerous gaps of Law's unavoidable exercise of violence since it wrecks signify and signified in the process of providing legal meanings. The assignment of a legal concept alludes to its contradiction by its very existence since a legal concept is a binary sign's manifestation, with no catholicon for the conundrum.[10].

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6 Santner, Eric L. *My Own Private: Daniel Paul Schreber's Secret History of Modernity*. Princeton UP, 1996. p. 15-16 *passim*. Bringing together with unique politesse the modern era, intermingling Benjamin, Foucault, Freud, and Nietzsche, Santner provides the setting where the positivist jurist Schreber at the height of his prestige, collapses into complete nervous delirium —drawing through his very deterioration a profound relationship between the teleological aspects of Law and his neuralgic propensity to absolve them at the sensitive level. In the central figure, one finds Schreber's delusional visions as the manifestation of Savigny's edifice dismantlement, in which the Roman roots intertwine with the emerging bourgeois world as if both could ever relate to each other. As Santner accurately demonstrates, Schreber's searches are vain since an abusive parental education allied with his predictive capacities arising from his juridical training are overcast by events escaping rationality. Juridical utopia affected Schreber individually in the rise of Modernity accomplishments. However, current times experience juridical utopia decadence in a more disseminated way, to say that it is not anymore Schreber's nerves enduring collapse, but the entire society experiencing it.

7 Derrida, Jacques. "The Force of Law", *Acts of religion*, edited by Gil Anidjar. Routledge, 2002. p. 278: "All the exemplary figures of violence of the law are singular metonymies, namely, figures without limit, unfettered possibilities of transposition and figures without face or figure [figures sans figure]." [Hereinafter The Force of Law]

8 Riccobono, Salvatore. *Scritti di Diritto Romano II: Dal Diritto Classico al Diritto Moderno*. Università degli Studi, 1964. p. 122-138. The author addresses the place of the two/four-category (delict, quasi-delict, contract, quasi-contract) conundrum with unique lucidity.

9 To follow the debate around the nature of rules and the unavoidability of the command, see recent account by Schauer, Frederick. *The force of law*. Harvard University Press, 2015. p. 2 passim. On rules of recognition see Hart, Herbert Lionel Adolphus, et al. *The concept of law*. [1961] Clarendon Press, 1993. p. 97 passim.

10 Legendre, Pierre. *L'amour du Censeur: Essai sur l'ordre Dogmatique*. Éditions du Seuil, 1974. p. 38*: "Le système juridique fonctionne pour tamiser, décolorer e recolorer, détruire et reconstruire en vue du grande œuvre dresser à l'amour du Pouvoir." The Force of Law, p. 235: "Besides, it was normal, foreseeable, and desirable that studies of deconstructive style should culminate in the problematic of right, of law [loi] and justice. Such would even be the most proper place for them, if such a thing existed: a deconstructive questioning that starts, as has been the case, by destabilizing or complicating the opposition between nomos and physis, between thesis and physis – that is to say, the opposition between law [loi], convention, the institution on the one hand, and nature on the other, with all oppositions that they condition."*

Although legal systems invoke Roman Law as a safe harbor for stability and durable traditions, the sources traversed from Ulpian's *pacta sunt servanda* to section 1.372 of the Italian Civil Code embodies a more convoluted and cryptic circuit[11]. Roman Law has historically served as a critical model for establishing legal tradition with an aura of prestige. Those who inherited this knowledge through the ages were granted the right to claim it as their own. However, the prestige associated with this enriched legal wisdom does not align with the actual, disjointed transmission of Roman Law throughout history. It is undisputed that the descendants of the Eastern Byzantine Empire cannot be considered the rightful heirs to the Roman legal tradition. Such a claim would not adequately account for how the West shaped its ideology around the remnants of Roman civilization. In this context, the Church's role offers a more precise depiction of how dialogue with canon lawyers enabled the development of a systematic approach that integrated Roman legal principles with canonical doctrine, thus laying the foundation for modern state governance.

Among the quandaries to hover are the conversion of natural obligations in binding agreements[12], the position of exceptions in the system, and the enforceability of sealess and formless agreements. In order to achieve that pursuit, two Roman Law impediments were to be overthrown. The first resided in the irrelevant bounding nature of the will when not accompanied by forms and rituals[13], the second the rearrangement of exceptions once it assumes a governing nature in the system. As the present confirm, both tasks were successfully

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[11] Article 1372. Effect of Contract: A contract is binding between the parties. It cannot be dissolved except by mutual consent or for reasons permitted by law. A contract has no effect with respect to third parties except in cases provided for by law.

[12] The relevance of natural obligations and gifts to the development of the will theory and the foregoing of formality was well perceived by Dawson, John P. *Gifts and Promises: Continental and American Law Compared*. Yale University Press, 1980. p. 96-121.

[13] As Foucault brilliantly explains, the ecclesiastical mediation of sins through penance has the critical function of requiring confession from the penitent and establishing a system in which truths are extracted at a price. See Foucault, Michel. *Abnormal: lectures at the Collège de France, 1974-1975*. Verso, 2003. p. 171: "What is penance in early Christianity? Penance was a status that one deliberately and voluntarily assumed at a given moment of one's life for reasons that could be linked to an enormous and disgraceful sin, but which could just as well be motivated by a quite different reason."

accomplished[14]. A problem that has troubled canonists, for it is the first obstacle in supporting the belief that exceptions contradict the rules.

The development of brocards to foster generalization generated a tautological conundrum to be solved by later glossators[15]. Such contradictions and inconsistencies were carried into forming the most diverse legal diplomas. They can only be confronted when the system requires further changes, as is the case at present in the most varied jurisdictional contexts.

While the American common law tradition sets forth the contract concept on breaches and remedies[16], continental civil law traditions attempted to provide a unified concept of agreements disregarding disruptions within the concept. International conventions such as the Vienna Convention on Sales unified both traditions and embraced a solution-oriented contract strategy[17]. The treatment of the exceptions abandoned concerns on fairness towards an objective orientation on why parties incurred breaches of promises. The implications on the sift of orientation affect the entire conception of Law obedience and Lawbreaking[18].

In Civil Law, as it applies *mutatis mutandis* in the origin of the constitution and the State, one finds the essential premise of the will as constitutive of the legal norm[19]. Although

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[14] Kennedy, Duncan. "From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'." *Columbia Law Review*, 2000, pp. 94-175.

[15] Stein, Peter. *Regulae Iuris: from juristic rules to legal maxims*. Edinburgh University Press, 1966. p. 142-143: "In his comment on lex I, Azo explains regula as a coniunctio *causae* and understands causa as ratio, citing the two texts mentioned by the Summa. He is scathing in his condemnation of Placentinus for suggesting that exceptions are de *regula* (*quis esset ita mentis inops?*), but is himself unable to deal with the problem satisfactorily. He admits that if a rule is vitiated and loses its function on proof of an exception, almost all rules must be declared false. (He is thinking of the comment on the regula Catoniana in D. 34.7.I.)

[16] "§1. Contract defined. A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty". Restatement (Second) of Contracts § 30 (1981).

[17] See Janssen, André; Wahnschaffe, Christian Johannes. "COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?" *Uniform Law Review*, vol. 25, no. 4, 2020, pp. 466-495. Also Guimarães, A. M. D. C., et al. "Covid 19 and the contractual performance crisis in international contracts governed by the vienna convention on contracts for the international sale and purchase of goods (Cisg)." *Revista Juridica*, 2021, pp. 158-183.

[18] Horwitz, Morton J. "The historical foundations of modern contract law." *Harvard Law Review*, 1974, pp. 917-956.

[19] A comprehensive study on such correlation can be found in Rosenfeld, Michel. "Contract and justice: The relation between classical contract law and social contract theory." *Iowa L. Rev.*, vol. 70, 1984, p. 769. See also Atiyah, Patrick Selim. *The rise and fall of freedom of contract*. Clarendon Press, 1979. p. 36-37.

the conception of state formation through collective will has proven to be fictitious, the lack of such theory leaves an uncanny void to escape since the 21st-century is still based on such premises[20]. The erosion of the public-private divide and the categories that enabled the bourgeois-capitalist formation of society, such as will, autonomy, equality, freedom, constitute platitudes that are repudiated as lacking the persuasive force that enabled its appearance. Furthermore, more recent movements have consistently discredited the operational façade of legitimacy and functioning of the system[21], bypassing an ultimate sovereign's will. [22].

Whereas in Public Law, the norm is constituted through the imaginary will of the people, forming the constitution through its original constituent power, in Private Law, the core of the norm that regulates subjects resides in the will[23]. The will, in turn, accompanying the

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[Hereinafter The rise and Fall]. See also The Force of Law, p. 282: "There is no contract that does not have violence as both an origin (*Ursprung*) and an outcome (*Ausgang*). Here a furtive and elliptical allusion by Benjamin is decisive, as is often the case."

[20] Maine, Henry Sumner. *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas. 1861*. Dorset, 1986. p. 26: "But I now employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman *Responsa Prudentum* as resting on fictions. Both these examples will be examined presently. The fact is in both cases that the law has been wholly changed; the fiction is that it remains as it always was.

[21] Moyn, Samuel. "Legal Theory Among the Ruins." *Searching for Contemporary Legal Thought*, edited by Desautels-Stein, J., and Tomlins, C. Cambridge University Press, 2017, pp. 99-113. The author brings a diffused delusion to the most diverse streams of legal thought, concurring, however, with other authors of the collected volume who "*indulges in reflective rather than restorative nostalgia,"* which enables a reassessment on the role on contemporary legal thought.

[22] Schiavone, Aldo. *Storiografia e critica del Diritto: per una 'archeologia' del diritto privato moderno*. De Donato editore, 1980. p. 49*: "Ad una ad una, le grandi categoria che hanno retto l'intero edificio del diritto privato della società borghese, e su cui si è poggiato tutto l'arco della separazione fra società civile e sfera dello Stato nell'età del primo capitalismo – il contratto come scambio fra 'eguali', la proprietà come godimento esclusivo di un bene da parte di un soggetto, il <<negozio giuridico>>, come modello classico dell'autonomia dell'operatore 'privato' nella sfera sociale ed economica, il <<diritto soggettivo>> come misura individuale di un ordinamento 'eguale'— tutte queste figure ritornano ora non più come le forme dominanti di un processo, in grado di totalizzare e di dirigere senza residui l'intera storia di una società, ma come immagini labili, modelli cui è sempre più difficile far corrispondere contenuti reali, cui è sempre più impossibile assegnare un ruolo di conoscenza e di direzione nella società contemporanea."*

[23] Neumann, Franz. "Economics and Politics in the Twentieth Century." *The Democratic and the Authoritarian State: essays in Political and legal theory*. The Free Press, 1957. p. 264: "The third illusion if that of the power of law. Fundamentally, in the theory of liberalism as in that of European Social Democracy, all political relations are dissolved into legal relations. What does this mean? Nothing else than the freedom of man is transformed into security. All relations between state and citizen are to be made calculable; concerning each of these relations one, perhaps two or three courts are to adjudicate. Law (Gesetz) is defined as an invasion of freedom and property, and because it is so defined, one must have guarantees that the invasion will not take place arbitrarily. The dissolution of politics into law is supposed to remove risk from politics. One wants to achieve everything, but risk nothing."

sophistication that Law requires, has received the conceptual category of autonomy of the will[24].

Although sovereignty's will was not always definitive in forming a binding agreement regardless of its form[25], the role of philosophical theories was critical in placing the subject's will in the center of a newly constituted individual world.

A world in which the individual becomes a crucial source for obligations and choices. Those agents of world events, and expectations on personal promises started to overlay mandatory contractual forms in which agreements should conform. This process started its formation through the pretorial construction of exceptions circumventing rigid structures and allowing the incorporation of the parties' will. From the emergence of the bourgeois codes as the epitome of its individualist content, the elaborators of modern canons understood that the contract presupposed the parties' agreement[26].

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[24] The role of a Jansenist theology and the influence in Domat's theory in Les Lois Civile and the rebuttal of the Jansenist precepts as heretical on *Cum occasione* by Pope Innocent X, contradicting the very emerging notion of canonical agreements guaranteed on oath is found in Sutter, Laurent de. "Agreements." *A Cultural History of Law in the Early Modern Age (87-135)*, edited by Peter Goodrich. Bloomsbury, 2019, p. 87-88.

[25] On the development of the assumpsit action and the enforceability of covenants replacing sealed agreements giving rise to the action of debt, see Simpson, A. W. *A History of the Common Law of Contract: the rise of the Action of Assumpsit.* Oxford: Clarendon Press, 1975. p. 18: "Indeed 'covenant', as we have seen, was their word for 'agreement'. Now a modern lawyer does not call every transaction involving agreement a 'contract'; for example, a licence to enter property for a picnic, or an undertaking which makes a person liable for negligent misstatement would not usually be so described; we are brought to confine the term contract to those transactions which can give rise to actions categorized as actions for breach of contract, and the actions available in the illustrations I have given are traditionally thought to be tort actions, which we like to distinguish from contract actions." Also, as an invaluable source for assumpsit: Ames, James Barr. "The History of Assumpsit. I. Express Assumpsit." *Harvard Law Review*, 1888, pp. 1-19.

[26] Solari's book The Individual Idea and the Social Idea will be revisited throughout this study. See Grosso, Giuseppe. *Gioele Solari: La Storia del Diritto Privato e il Diritto Romano, Estratto dalle Memorie della Accademia delle Scienze di Torino, Classe di Scienze Morali, Storiche e Filologiche*. serie 4º, n. 26, Torino, Accademia delle Scienze, 1972, 25-31, p. 28: *"[...] e particolarmente viva è l'esigenza di uno studio storico, e la storia del diritto nei secoli XVII-XX, in particolare per il diritto privato, è un terreno che deve essere particolarmente scavato. E il rapporto colle ideologie vi ha un notevole risalto; ed anche il valore della tradizione romana, e del retaggio che ne è venuto, e il filtro di essa attraverso i movimenti generali del pensiero, assume un vivo significato di storia del diritto; e così è per i problemi generali della codificazione, e la base filosofica dei diversi codici; la racide nelle ideologie e nel pensiero filosofico e la rispondenza alle attese concrete della società sono aspetti vivi che si mescolano e si confondono. E il giurista e lo storico del diritto oggi trova impellente ragione di riprendere il dialogo con Giole Solari e con sui studi, vitalmente storici, di filosofia del diritto privato."*.

Since this idyllic perception is nothing but an illusion, the operation of that freedom was condemned to fail since the powers to negotiate agreements are never a given but conquered and exchanged based on the positions of power each party occupies while bargaining this very power[27]. However, by doing it, they left for the doctrine and jurisprudence the role of developing the elements that would result in modern contract doctrine[28]. As explained at length by Professor Monateri, the system generated a synecdoche to obnubilate the unfeasibility of delivering a Code that would forego interpretation[29].

The Napoleonic Code legislators, preoccupied as they were with concision, relegated to provisions spread across the document the task of ensuring the enforceability of fair *causa*. The drafters relied upon Pothier and Domat doctrines to accomplish the simplification operation undertaken over the centuries to surmount arrangements disregarding consent[30].

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[27] Atiyah, P. S., and Summers, Robert S. *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions.* Claredon Press, 1987, p. 52.

[28] Schiavone, Aldo. *L'invenzione del Diritto in Occidente*. Einaudi, 2005. The recognition of agreements between parties under the insignia of agreement between parties is consolidated around the 3rd and 2nd century in the author's lesson, and its origin goes back to a family law account. See p. 229*: "Accanto a queste curiosità più propriamente lessicografiche, di cui restano anche altre tracce, non era estranea a Servio una sottile curiosità per la nascita e per i particolari di remote istituzioni del mondo latino. Da quel che possiamo ricostruire, la sua monografia De dotibus, letta ancora da Nerazio e da Gellio, doveva essere ricca di queste notizie, Vi si raffigurava fra l'altro con precisione il cerimoniale degli sponsalia – del fidanzamento – come avveniva <<in quella parte d'Italia chiamata Lazio>>: <<Chi si preparava a prender moglie, chiedeva a colui il quella doveva concederla [il capofamiglia della sposa] una formale promessa che l'avrebbe ottenuta, ed egli a sua volta si impegnava nello stesso senso. Questo contratto di promesse incrociate veniva chiamato 'fidanzamento'>>. Nella descrizione, Servio trovava l'occasione di impiegare il sostantivo contractus – << contratto>>: ed è il primo uso accertabile di questa parola, destinata a diventare un simbolo della storia giuridica dell'Occidente (in Mucio abbiamo osservato solo la presenza del participio verbale: quidque contractum). Il nuovo termine – sia pure in un contesto non legato al disciplinamento degli scambi mercantili – tradiva la conquista di un gradino decisivo verso la costruzione di una compiuta forma ontologica in grado di rappresentare l'esistenza astratta di un vincolo giuridico simmetrico fra soggetti formalmente eguali, al di là dei concreti contenuti sociali dedotti nel rapporto: una figura che da allora in poi avrebbe avuto un ruolo essenziale nel bagaglio concettuale di ogni giurista e poi, nella modernità, do ogni scienziato politico o sociale."*

[29] Monateri, Pier Giuseppe. *La sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti*. Giuffrè, 1984, p. 482.

[30] Capitant, Henri. *De la cause des obligations: Contrats, engagements unilatéraux, legs*. Dalloz, 1927. Avant-propos : *« Qu'est-ce donc que la cause ? Quel est son rôle au moment de la formation du contrat, ou même après, jusqu'à la complète exécution des obligations qu'il engendre ? Quand peut-on dire qu'une obligation est sans cause, ou a une cause illicite ou immorale ? Sur ces questions les interprètes ne sont pas arrivés à se mettre d'accord, et l'on peut dire qu'en cette matière, plus d'un siècle après le Code civil, tout est encore sujet à discussion.* » Chevrier, Georges. *Essai sur L'Histoire de la Cause dans les Obligations*. Recueil Sirey, 1929. p. 251-252.

Still, *causa* as a token for engagement under binding agreements to supplant the Roman diagram remained a controversy open for debate, a manifestation of a non-cemented pacification on fundamental legal grounds for performing agreements[31].

Indeed, the Code inconsistencies were perceptible from its very birth. Article 1101 of the Napoleonic Code offered an elegant wording for the formation of the contract as an agreement of wills. The code relegated to less evident provisions the burden to introduce the reader into the complexities of *causa* or frustration, leaving the impression that *quid pro quo* or consideration were redundant requisites in the newly instituted Code for evolved societies[32].

Despite the mismatch, the solution represented an achievement by enabling the immediate execution of synthetic commands, conciliating predictable provisions layered with rules applicable once parties attempted escaping their promises.

Before self-executed contracts and algorithmic rules offered certitude as it aspires doing today, the French Civil Code fulfilled the Illuminist promise of dismantling a former societal feudal organization in the name of progress and the promise for parties to enter agreements binding them as if it was Law[33]. It served the interests of a consolidated bourgeoise that could replicate the French recipe repeatedly in other jurisdictions and consecrate jurists as the masters of organizing a society in a predictable way, leaving for interpretation and jurisprudence the role of developing the elements and attributes that would result in modern contract theory. Its

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[31] Gianti, David. *La Legge dei Privati: Genealogia dei paradigmi continentali del Contratto*. Mimesis, 2017. The author provides a comprehensive account of the sources of *causa* and its connection with theological development on the Christian tradition, bridging the epistemic void created between Roman authorities and modernity through canonical literature.

[32] For the doctrine of consideration see Jenks, Edward. *The History of the Doctrine of Consideration in English Law*. Cambridge University Press, 1892. p. 216-217: "A man could never bring Debt unless he claimed a fixed sum and shewed *quid pro quo;* but it did not follow that he could not enforce his demand in another way. By this process of development, the law of simple contract, hardly existing in Glanville's day, and scarcely needed by a society organized on the principle of *status,* began to make its appearance. But, as the status *régime* broke down in all directions, the need for a more comprehensive system of simple contract began to be very pressing."

[33] Esmein, Adhemar. *Cours Élémentaire D'histoire du Droit Français*. Recueil Sirey, 1925. p. 335: *"Les jurisconsultes, que construisaient peu à peu le nouveau droit public à l'encontre des principes féodaux, n'invoquaient pas seulement les lois romaines ; ils faisaient appel à un principe supérieur, compris aisément de tous accessible aux ignorant comme aux savants : l'idée de l'intérêt public, auquel ils donnaient le roi comme représentant.*

critics existed from the early phases of its enactment, pointing out the unfeasibility of freezing juridical change in one diploma totalizing life.

Opponents arose from the historical school and traditions that raised suspicion on the fossilizing nature that a Code represented. Those criticisms were mitigated through judicial interpretation and the doctrinal capacities in providing a fresh understanding of polysemantic meanings.[34]

Consent as an exhaustive factor in the contract's composition was the system's highest premise. However, consent as a fundamental element of the notion of contract left a myriad of situations unresolved, in which consent would not suffice the formation of a contract.

Thus, the theorists who built the system that led to modern codes, attempting to detach a contractual theory of cause from glossators' development, heavily relying on canonical doctrine, sought to provide secularized theories for the same categories that emerged under theological influence[35]. This gradual but continuous detachment matured into the campaign to suppress existent institutions inspired by codes drafted in the bourgeois era that still had its roots in this tradition.

As will be demonstrated, this effort is doomed for failure. As elucidated by Calasso's *Introduzione al Diritto Comune*, the inconsistencies in modern contractual theory dueling with Roman Law fossilized categories arises from the void on better-accessing *ius commune* elements allowing for the formation of the contractual theories. The church's role, not limited to scholastic studies, was fundamental for equity overcome through Christianity[36].

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[34] Oppetit, Bruno. *Essai sur la codification*. Presses Universitaires de France, 1998. p. 62. "*Historiquement, toutes les grands codifications ont été réalisées dans un cadre national : les commentateurs de la codification napoléonienne, en dépit de l'universalisme qui animait Portalis, ont préféré insister sur le caractère national d'une codification faite « selon les mœurs, convenances et conditions de la national française » dont il devient « le livre de raison » et sur son adéquation aux besoins d'un « monde attaché à la terre « ; l'accent a été mis moins sur la dimension fondatrice et prospective du Code civil que sur sa valeur statique de consolidation d'un ordre social donné. »*

[35] Goodrich, Peter. "The political theology of private law." *International journal of constitutional law*, vol. 11, no. 1, 2013, pp. 146-161.

[36] Calasso, Francesco. *Introduzione al Diritto Comune*. Giuffrè, 1951. p. 145 ss.

Contract as promise: dressing the contract with consent[37]

Contractual freedom exercise consolidated the growing transactional system and ensured freedom within the limits of sovereignty. The Napoleonic Code's drafters inserted precepts of public order, moral values, and good morals in its provisions. Those devices were a fragile solution to conciliate the liberal values with sovereign order while state-power was not yet consolidated. In this way, if parties would enter feudal agreements based on former societal arrangements, courts would sanction those agreements as void due to violations of those precepts[38]. As Guarnieri has already pointed out, the intention would be to allow these precepts to radiate through the system in order to restrain the old order from continuing to enforce its values, allowing the formation of the nation-state by means of forced currency and the dismantling of feudal values based on hierarchy overriding the will of one of the parties[39].

Given the urgency of erecting a system that could accompany the speed of change that was taking place in the global order and given the absence of a legal edifice that better served the purposes of emerging capitalism, the jurists and their codes entitled themselves as those legitimized to guide these dynamics. As an addendum, they were legitimized in the political universe and on the entrepreneurial, labor, family context, and all the social intercurrences that could arise from that order.

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37 See Fried, Charles. *Contract as promise : a theory of contractual obligation*. Harvard Univ. Press, 1981.

38 Lyon, Bryce Dale. *From Fief to Indenture : the Transition from Feudal to Non-Feudal Contract in Western Europe*. Octagon Books, 1972. p. 43 ss.

39 Guarnieri, Attilio. *L' ordine pubblico e il sistema delle fonti del diritto civile*. Padova, 1974. p. 13-14. The author offers three hypotheses for the influx of public order in the emerging code. According to his studies, the most likely reason for incorporating public policy precepts in the freedom of contract is the French Revolution and the break with feudal traditions.

Under that world order of placing the will and freedom as the ultimate values of the system, the exception consisted precisely in invoking will's non-prevalence when unforeseen or unforeseeable situations occurred as agreements were concluded.

Though, over time the contractual theory has experienced several setbacks, managing to endure the attacks coming from political forces opposed to the liberal tradition, as in the case of the Nazi and Fascist regimes in the 20th century[40]. In the post-World War II social context, the liberalizing vocation of Private Law found resistance to return to its pre-war parameters since it was impossible to deny the recently defeated Nazi and Fascist regimes and the still existing Soviet reality[41].

From that turning point, a change occurred, the level of interference of a totalitarian regime was against the capitalistic enterprise, but the threat offered by communism justified state intervention on contractual policy[42].

According to the geopolitical reality of the time, the chimera of the disproportionate exercise of contractual freedom needed to be supplanted by a growing interference in contractual freedom and state intervention in the contractual content to assess compliance with its social function.

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[40] The Italian Civil Code of 1942 is a result of the orientation of these forces, which justifies the debate between Italian legal culture and the emergence of fascism, which is characteristic of the complexity of abstract theories that are amalgamated in a given legal text and the political context in which they arise. See Monateri, Pier Giuseppe. "The authoritarian theory of contract." *Comparative Contract Law. Research Handbooks in Comparative Law*, edited by Pier Giuseppe Monateri. Edward Elgar Publishing, 2018, pp. 47-66. In dealing with the reconfiguration under an authoritarian prism of Private Law's architecture, Professor Monateri launches an instigating correlation between the establishment of fascist and Nazi authoritarian regimes and a reinterpretation of Private Law, primarily contractual and obligations, by stating the following: "The morphology of private law was synthetically moulded in order to produce and, meanwhile, deal with a juridical exception: it was framed into a liminal threshold between tradition and innovation." For a comprehensive account of the Italian ambience see Cappellini, Paolo. "Il fascismo invisibile: Una ipotesi di esperimento storiografico sui rapporti tra codificazione civile e regime." *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. 28, no. 1, 1999, pp. 175-292. Somma, Alessandro. "Liberali in camicia nera: La comune matrice del fascismo e del liberismo giuridico." *Boletín mexicano de derecho comparado*, vol. 38, no. 112, 2005, pp. 293-323. For a general European context see Halpérin, Jean-Louis. *Histoire des Droits en Europe: de 1750 à nos jours*. Flammarion, 2006. p. 244-259.

[41] Hudis, Peter, and Kevin B. Anderson. "Introduction." The Rosa Luxemburg Reader, edited by Peter Hudis and Kevin B. Anderson, Monthly Review Press, 2004, pp. 7.

[42] Raiser, Ludwig, et al. *Il compito del diritto privato: saggi di diritto privato e di diritto dell'economia di tre decenni*. A. Giuffrè, 1990. p. 56-57. Although the author makes no such judgment, such reasoning is intrinsic to the historical reality of the period.

The birth of the will and its further demise

The strengthening of the managerial state in the 21st century led many authors to advocate for the death of the contract since the influx of the contractual social function imposed consumer regulations and control over private parties' agreements. According to that literature, state interference implied damage in the heart of the contractual theory.

As Gilmore emphasizes to justify a moribund contract, as the theory and courts decisions evolve, all agreements lead to suits based on torts[43]. Unlike Gilmore's perception that the contract is dead, this study suggests another path supporting the view that the contract's theory is receiving a resignification. The development of multiple categories requiring high juridical sophistication becomes increasingly superfluous since bourgeois capitalist society achieved what was aimed with contractual engineering.

The need to cover capitalistic enterprises under principles of freedom and equality loses its legitimacy and justification once it finds no more opponents to its project. Marxist projects' erosion and the bending of the juridical system as the promoter of an emancipatory task eliminated the necessity of legitimization through theoretical reflection. There are no expectations whatsoever to legitimize Law through legal thinking. Jurists took their role in marketing the legal system according to the prevalent views of freedom of commerce and equality[44].

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[43] Gilmore, Grant. *The Death of Contract*. Ohio State Univ. Press, 1974. p. 94: "Let us assume, arguendo, that is the fate of *contracto* to be swallowed up by tort (or for both of them to be swallowed up in generalized theory of civil obligation). We must still provide ourselves with an explanation of what contract – the classical or general theory of contract, as we have called it – was about in the first place and, if it is now dead or dying, what caused the fatal disease."

[44] A vanguardist vision of the incursion into the archeology of legal concepts at times when there is a eulogy towards legal discourse can be seen in Balestrieri, Mauro. *La Legge L'arcaico Genealogia Comparata dell'ordine moderno*. Mimesis, 2017. p. 13 *passim*.

Once the needs were depleted on finding the ideal justification, the next capitalist stage is to remove juridical complexity in favor of more operability of the system by multiple actors outside the scopes of the Law. Gilmore was partially accurate, but he lacked the factual events that would prove his theory right. Besides, he also pointed to the erroneous evildoer since the problem was not State control but the dynamics leading to contractual theory reshape.As the study of the exception in Civil Law will demonstrate[45], the underlying problem is interpretative[46]. The correspondence between command and theory in the Law is one of an unapproachable nature.

The issue of an ever-expanding list of exceptions and deviations from the will is understood accurately only if the present-day analysis is allied with a historical examination of the sources of exception[47].

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[45] The study of the exception in Private Law finds an echo in a growing literature that has perceived the paradoxes arising in a State which adopts exception techniques already experiencing an entire exceptional system put in place to sanction the (neo)liberal economic order. Abriani, Niccolò; Caselli, Gian Carlo; Celotto, Alfonso; Marzio, Fabrizio Di; Masini, Stefano; Tremonti, Giulio. *Il Diritto e l'eccezione: stress economico in tempi di emergenza*. Donzelli editore, 2020. p. 3: *"Stiamo entrando in una terra dove è già ora difficile, ma sarà sempre più difficile definire il confine tra prima e dopo, tra vecchio e nuovo, il confine politico e giuridico tra regole ed eccezioni, come è nel titolo di questo volume"*.

[46] Monateri, Pier Giuseppe. « Règles et technique de la définition dans le droit des obligations et des contrats en France et en Allemagne : la synecdoque française. » *Revue internationale de droit comparé*, vol. 36, no. 1, Janvier-mars 1984, pp. 7-57. The synecdoche can be verified when, despite the interpretative dissonance, the content of the norm remains the same.

[47] Diósdi, György. *Contract in Roman Law: from the Twelve Tables to the Glossators*. Akadémia Kiadó, 1981. p. 133: "Reading carefully the texts referring hereto, and meditating on the rule that *nudum pactum* may not result in action but only exception, we can hardly achieve another conclusion than the author of *Medidatio*. Had the *nudum pactum* meant an independent agreement, not connected to other legal relations but not releasing a positive legal effect, then the negative legal effect: the *exceptio*, and the legal effect to be found in the other sources, would be simply unimaginable. But interpreting the expressions *pactio nuda* or *pactum nudum* or *nuda conventio* as an agreement modifying the contract (or another legal relation) subsequently, every legal effect becomes understandable and reasonable. In the Roman action system, the almost inestimable importance of which in investigating the contract was already observed several times, the coming about of *actio* was the legal consequence of definite facts of a case. It is logical, therefore, that the agreement which modifies subsequently or even cancel the facts of a case (the contract) bringing about the action, makes possible an exception – since it has changed the facts of the case of action – but there does not originate any *action* from it. In the *Meditatio de nudis pactis*, the text to which the author alludes, one finds the sophistication of an unknown Byzantine jurist, attributing to pacta nuda the equivalent of a pact concluded after a certain interval. The consulted references for *Meditation* are MONNIER & PLATON, G. (1913). *La Meditatio de Pactis Nudis* (Μελέτη περὶ ψιλῶν συμφώνων). Nouvelle revue historique de droit français et étranger, 37, 135–168, 474-510, 624–653; '' 1914, 38, 285–342, 709–759.

The limits on will and the crescent possibilities that a party that celebrated an agreement find to frustrate performance are entirely legitimate if the study of exceptions succeeds in returning to its earliest origins of *pacta* and *conventio*.

Incorporating former defenses into exceptions enabled the construction of the modern contract theory, abandoning the Roman Law formulary system of actiones[48]. *Exceptiones'* retrospective development can be seen in Manenti's Contributo Critico alla teoria generale dei Pacta, which will be further clarified in this work since its logic is of fundamental importance[49]. Di Contardo Ferrini presents Manenti's view as ingenious, proposing that Manenti's original distinction between *pacta* and *conventio* substantially modifies the Romans' understanding of the *conventio*.

The Romans rejected granting protection to the convention since they found it threatening to assure rights and obligations arising from parties' will entered under naked agreements[50]. Whereas *pacta* was recognized by the times of the XII Tables, agreements lacking *vestimenta* would not receive the protection that modern systems provide. Following this reasoning, the imperium of the will that headed the entire genesis of modern contract theory would be nothing but a growing belief in autonomy's fiction. As a result, eliminating valves

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[48] Cappelletti, Mauro, James Gordley and Earl Johnson Jr. *Towards Equal Justice: a comparative study of legal aid in modern societies*. Dott. A, Giuffrè editore, 1975. p. 6-7: "The *legis actio*, the earliest Roman procedure to rise above primitive levels, seems to modern eyes almost designed to defeat justice rather to uphold it. By this procedure a case was brought before a magistrate through a series of ritual acts and declarations established by statute and by priestly lawyers who interpreted it. The parties themselves were not represented; as a result, these ceremonies were largely the secrets of patrician magistrates who used them as a barrier against the claims of the plebeian class. However, in about 259 B.C., a plebeian *pontifex maximus* succeeded in making these secrets public, thus destroying the value of this procedure as a class weapon and paving the way for the more rational *formula* procedure which superseded it." The foundational work on access to justice expands its reach to contemplate the origins of a system of access to justice not restricted to the right to petition and access to court, but ultimately as a system of popular representation in previously denied spheres, dedicated exclusively for those in power to enforce their privileges.

[49] Manenti, Carlo. *Contributo critico alla teoria generale dei pacta secondo il diritto romano*. Enrico Torrini Editore, 1891. p. 28: "*Quest'illusione che aveva portato il diritto canonico sino al punto di dare forza obbligatoria a tutte le promesse giurate, si trovò poi in perfetta armonia col concetto esagerato, in parte anzi falso addirittura, della libertà soggettiva individuale, e conseguentemente della responsabilità dell'individuo per tutto ciò che fosse mero effetto di una sua determinazione volontaria. Si credette che la funzione, il che nel trovare tutti i mezzi per assicurare entro i limiti del lecito e dell'onesto, la costante e più completa attuazione della volontà dei singoli."* As will be later presented, his discoveries also led to his awareness regarding the outcomes from naked's agreement adoption in the emerging codes.

[50] Ferrini, Contardo. *Sulla teoria generale dei pacta*. 1892. p. 2-3.

through which the will concedes its position to equity will not be the erosion of the system but the reconciliation to its roots[51].

Therefore, if the approach taken corresponds to Baldo's *"ex facto oritur jus,"* the applicable logic shall be that the exceptio is the adjustment of the Law to the facts[52]. While the predictable arise from the rules, the unforeseeable surface from the exception. The Law evolves by incorporating irritative novelties into the system, "but this openness cannot be carried too far "[53] since the Law not only perform commands but requires variety to evolve[54].

The *pacta* was the exception for agreements such as stipulatio. With an uncovered pacta, the opponent could raise defenses to repeal the celebrated agreement. *Pacta*'s insufficiency to enable the exercise of defenses allows the expansion of exceptions that, on the other hand, confers more flexibility to parties' will since the sources of exceptions heavily rely on correcting injustice and enforceability against precepts of yet non-disclosed agreements and expectations[55].

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[51] See Cohn Max Conrat. Das Ashburnhamer Rechtsbuch Quelle Der Exceptiones Petri. Druck Von A. Pries 1886. See also Dolezalek, Gero R. "Roman Law: Symbiotic Companion and Servant of Canon Law." *The Cambridge History of Medieval Canon Law*, edited by John C. Wei and Anders Winroth, University of Oslo, 2022, pp. 230-261 and Chiappelli, Luigi. Lo Studio Bolognese nelle sue origini e nei suoi rapporti colla scienza pre-Irneriana. Fratelli Bracali, 1888.

[52] Rossi, Luigi. "Un criterio di logica giuridica: la regola e l'eccezione particolarmente nel diritto pubblico." *Rivista di Diritto Pubblico e della Pubblica Amministrazione in Italia*. La Giustizia Amministrativa, parte uno, XIV, 1935.

[53] Luhmann, Niklas. "Law as a social system." *Nw. UL Rev.*, vol. 83, 1988, p. 136.

[54] Lawrence, Lessig. *Code*. Basic Books, 2006. p. 72: "Throughout this section, I've been speaking of two sorts of code. One is the "code" that Congress enacts (as in the tax code or "the U.S. Code"). Congress passes an endless array of statutes that say in words how to behave. Some statutes direct people; others direct companies; some direct bureaucrats. The technique is as old as government itself: using commands to control. In our country, it is a primarily East Coast (Washington, D.C.) activity. Call it "East Coast Code." The other is the code that code writers "enact"—the instructions imbedded in the software and hardware that make cyberspace work. This is code in its modern sense. It regulates in the ways I've begun to describe. The code of Net95, for example, regulated to disable centralized control; code that encrypts regulates to protect privacy. In our country (MIT excepted), this kind of code writing is increasingly a West Coast (Silicon Valley, Redmond) activity. We can call it "West Coast Code." The author presents the challenges facing creating a legally regulated architecture in the cyberspace environment. However, the most compelling aspect from a geopolitical point of view lies in the geopolitics between East and West, representing state legislation and codes created in Silicon Valley.

[55] Riccobono, Salvatore. *Corso di diritto romano" stipulationes contractus pacta", anno academico 1934-1935*. A. Giuffrè, 1935. p. 321-324.

Stipulatio's degeneration produced the broadening of exceptions to the point in which causa becomes a generalization of the *exceptiones* themselves[56]. Accordingly, ending a dispute by applying an exception is not different from celebrating peace in a consensus that has dissolved since the core element of exception's supplication is the presence of a third party, able to recognize the original agreement and the breach justified by the exception[57].

The purpose of such a consideration is not to review the Roman literature developed over the centuries, not to say millennia. The core of the inquiry consists in observing the long theoretical and operational path that led to the differentiation between the origins and the current picture in the face of the most diverse legal systems. As it is a process in continuous mutation, the considerations that prompt one passage to another justify a visit to the past. Accounting for the most remote past is a task not intertwined with the Romanists' object of study but rather a reframe of a narrative more interested in the nuances than in the standard.

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[56] Birocchi, Italo. "Tra tradizione e nuova prassi giurisprudenziale: la questione dell'efficacia dei patti nella dottrina italiana dell'eta moderna." *Towards a General Law of Contract*, edited by John Barton. Duncker & Humbolt, 1990, pp. 249-366. p. 270: *"Infatti, in connessione con il nuovo rilievo assunto dalle fonti particolari dall'età dei postglossatori, anche per il patto l'àmbito di riflessione si allarga: non solo l'esperienza del diritto canonico ma anche quelle del diritto particolare e del diritto feudale proponevano elementi che era comodo e facile ricomprendere tra le eccezioni. E, del resto, nella concezione dei commentatori le soluzioni che si trovavano nel ius proprium non potevano che costituire <<eccezioni>> al diritto comune o almeno disposizioni praeter ius comune, in un quadro normativo fondamentalmente caratterizzati dalla dialettica regola-eccezione."* The chapter provides an in-depth digression into extending exceptions and the role of causa in such a process. See also Vinogradoff, Paul. "Reason and Conscience in Sixteenth-Century Jurisprudence." *LQ Rev.*, vol. 24, 1908, p. 373. In the article the author establishes a close correlation between formless contracts known as *parol*, the cause of continental tradition and the common law *quid pro quo* that would give rise to the consideration.

[57] Astuti, Guido. *Contratti Obbligatori nella Storia del Diritto Italiano. Parte Generale*. Volume I. Dott. A. Giuffré Editore, 1952. p. 66*: "[...] Ulpiano contrapponeva le nude conventiones o pactiones, nude perché prive di forma e perché non concluse sulla base di una causa per cui una forma non fosse richiesta, ed enunciava il principio fondamentale della loro inidoneità radicale a generare un vincolo obbligatorio. Contro questa concezione tradizionale del pactum come convezione aformale in genere, è stato sostenuto che nel diritto romano classico il termine pactum, col verbo pacisci, avrebbe tipicamente indicato solo la convenzione consistente nella rinunzia, esplicita o implicita, all'esercizio di un diritto di azione attuale o potenziale, e avrebbe perciò avuto naturalmente come unico effetto una exceptio (Manenti). Senza dubbio le fonti documentano l'uso originario di pacisci in questa accezione più ristretta (si consideri l'analogo significato del più antico pacere (pax), e il ni cu meo pacit, talio esto delle XII Tavole, che indica appunto l'accordo o composizione fra il reo e il leso per evitare il taglione (Tab. VIII, 2: cfr. Tab. I, 6-7): al pactum come accordo diretto ad eliminare una pretesa, e quindi a sciogliere un vincolo fra le parti (pactum di non petendo), si riferisce precisamente il pacta conventa servabo della clausola edittale, con cui il pretore accordava l'exceptio pacti conventi."*

Classical Roman law as an object of true inspiration or derivation or an instrument invoked to confer legitimacy on a legal system becomes an element of indispensable analysis for those who intend to escape the positivism emerging in the post-codification movement.

Over the centuries, the jurists' thaumaturgy entailed receiving rules as raw materials for generating doctrinal and judicial exceptions to the Law[58]. Ulpian's Dig. 2,14,7,4 "*Sed cum nulla subest causa, propter conventionem hic constat non posse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem*" translates into the notion that a bare pact produces only exceptions. Unlike modern perspectives that settle a divide between substantial and procedural rights, agreements constituted rigid forms requiring knowledgeable authorities to instruct the parties in disputes.

The *exceptiones* bequeathed the reshaping of contracts rigid formulas of exercisable rights under Roman Law in the elegant and reliable premise of promises must be kept. Whereas the exceptiones understood as substantive defenses became substantive rights of the parties entering agreements, the positive aspect of *exceptiones* morphed into *aequita*s, functioning as a channel for justice. In its oldest form, the pacts that parties should respect even when deprived of formalities were few, and on Lorenz's classification were "Purchase and Sale, Hire, Partnership, and Mandatum"[59].

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[58] We borrow an expression used by Bloch by which miraculous powers were attributed to kings, especially in France and England. A compelling passage refers to their disappearance from the 17th century. This period coincides with a growing royal legitimization through the legal apparatus, hence the use of the expression. See: Bloch, Marc. *Les Rois Thaumaturges : Étude sur le caractère surnaturel attribué a la puissance royale particulièrement en France et en Angleterre*. Armand Colin, 1961. p. 20-21 : « Plus vieille de beaucoup que les plus antiques dynasties historiques de la France ou de l'Angleterre, on peut dire d'elle, si l'on veut, qu'elle survécut longtemps au milieu social, presque ignoré de nous, qui d'abord avait conditionné sa naissance. Mais si l'on entend, comme on le fait d'ordinaire, par ‘'survivance' une institution ou une croyance d'où toute vie véritable s'est retirée et qui n'a plus d'autre raison d'être que d'avoir un jour répondu à quelque chose, une sorte de fossile, témoin attardé d'âges périmes, en ce sens l'idée qui nous occupe, au moyen âge et jusqu'au XVII siècle au moins, n'eut rien qui autorise à la caractériser par ce terme ; sa longévité ne fut pas une dégénérescence. »

[59] Lorenzen, Ernest G. "Causa and Consideration in the Law of Contracts." *The Yale Law Journal*, vol. 28, no. 7, 1919, pp. 621-646.

The modern codes absorbed the growing expansion and shift of consent's meaning to arrive at the understanding that will make agreements binding if entered with a cause, and therefore, the exceptions left the procedural realm to function as substantial defenses[60]. This reduction could be recognized as an unattainable attempt to merge non-synchronic systems that existed in a plurality of legalities and geographies[61]. However, by examining multiple contractual systems and how change occurs, a pattern surfaces, indicating another turn in contractual theory[62].

The movement to reform legal systems across Europe under the justification that decided and analyzed categories does not correspond to the enacted legislation functions as a veneer to relinquish the role of the jurist ad the driving force of Law's advancement. To illustrate the disconnection between discourse and social reality, the Napoleonic Code emerged, claiming its capacity of direct engagement with society since its provisions were clear at the same time were juridically refined.

Beneath its promise of predictability, provisions camouflaged intense debate over the nature of the contract, how to allocate promises and gifts within contractual theories, and many other controversies arising from the nature of the cause in contract, the role of the will on

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[60] Agamben, Giorgio. "The Sacrament of Language: An Archeology of the Oath." *The Omnibus Homo Sacer.* Stanford University Press, 2017. p. 304: "And this function seems to be so necessary for human society that, despite the clear prohibition of every form of oath in the Gospels (Matthew 5:33-37; James 5:12), it was approved of and codified by the Church, which made the oath an essential part of its own juridical order, legitimizing in this way its maintenance and gradual expansion in the law and practice if the Christian world. And when in *De jure naturae et gentium* [Of the Law of Nature and Nations] Samuel Pufendorf assembled the tradition of European law, it is precisely in its capacity of guaranteeing and confirming not only pacts and agreements among men, but also more generally language itself, that he establishes the necessity and the legitimacy of the oath: (…)"

[61] Duve, Thomas. *Entanglements in Legal History: Conceptual Approaches Thomas Duve*. Max Planck Institute for European Legal History, 2014. p. 32. Providing a formative training on key concepts for the understanding of Comparative Law is Sacco, Rodolfo. *Introduzione al Diritto Comparato: Lezione raccolte, ad uso degli Studenti, da Silvia Ferreri, Pier Giuseppe Monateri, Erika Pozzo dal Mounsü, Alberto Tealdi Lino Tedeschi*. 2nd ed. Giappichelli, 1980. p. 4: "L'osservazione diacronica si estende a più fenomeni della stessa specie, scaglionati nel tempo. L'osservazione sincronica si estende a più fenomeni contemporanei tra di loro."

[62] Luzzato, Giuseppe Ignazio. "Eccezione nel Diritto Romano." Enciclopedia del Diritto, vol. 14, Giuffrè Editore, 1965, pp. 135-139, p. 135: "Essa sorge col procedimento formulare, ed in funzione della più ampia ingerenza che è stata concessa al magistrato nell'ambito di tale processo, e trova il suo più ampia ingerenza che è stata concessa al magistrato nell'àmbito di tale processo, e trova il suo più vasto campo di impiego laddove è necessario correggere la norma dello ius strictum, qualora questa si riveli in contrasto con le esigenze dell'aequitas."

contractual formation. As it will be further advanced, the perils of French codification do not necessarily coincide with other European experiences. However, it still provides considerable sources to investigate other juridical experiences.

Legal systems that led to the drafting of the codes come from legal traditions amalgamated over the centuries, and some assumptions regarding why certain elements are suited to the formation of legal institutions have proven to be disjointed from the historical course that the systems have followed.

By assembling the puzzle, pale traces of a remote tradition, that are nevertheless indistinguishable from the historical chain from which specific conclusions are drawn, create a possibility of verifiability of a regime. Also, the result of the present choices will determine which line of events will be used to draw a consistent retrospective.

The concept of consent, considered a cornerstone of contract law in Germany, is deeply rooted in the ancient customs of Germanic tribes, where the belief was widely held that promises should be upheld. This tenet provided a suitable foundation for the adoption of the canon law concept of the oath. In this context, the act of swearing before God was perceived as an agreement binding in nature. Such cultural exchanges are facilitated by common grounds, yet they require a conducive environment to flourish[63].

As a result, the multiple European traditions detached from *ius commune* produced a system that recurrently consults borrowed institutions to advance its legal systems. Under the

[63] However, the scholarship that the word or *solo consensu* satisfied the German binding contract nature has been proved inaccurate by more recent findings. See Brissaud, Jean. *A History of French Private Law*. Augustus M. Kelley Publishers, 1968. p. 471-472: "No more in Germany than in ancient Rome were obligations formed '*solo consensu'*. The well-known gibe, 'A man of honor has but his word', '*Ein Mann, ein Wort*,' did not at first have the meaning which is given it to-day. As far primitive times are concerned, the only formula which is applicable is the following: 'To promise and to keep promise are two different things.' And such is, even still, only too often the ethics of the man of the people; a verbal engagement has little weight in his eyes, he does not show any very great scruple as regards violating it when he knows that there are no means of holding him to it; he only feels himself bound by the obligation of an oath, by the giving of a pledge, or by the intervention of a notary."

influence of Cartesian rationalism pervading Europe, with approaches such as of Leibniz[64], led to the substitution of form, rituals, and solemnities – conceived in a time where the absence of writing justified its adoption – for calculable-economic variants[65].

Rationalists perceived legal relics of past times as factors slowing the pace of a more predictable world. Embracing this perspective is a critical issue to examine the extent to which present-day reforms of Contract Law in Continental legal systems have respected the premises on which these systems are built.

The simplification process that the system had undergone is now presenting irreparable fractures in the form of an imposing challenge at the doctrinal level. The difficulty resides in the necessity of returning to how the regime of exception turned into the rule. For that task, it is imperative examining how exceptions evolved through the glossators, post-glossators, and the Roman Digest to render all agreements enforceable, accepted as conforming to the Law as long as they had a causa to justify their bareness.

Grounds for excavating concepts carried over millennia to existing legal systems

For an already considerable time, learned scholars in contracts pointed out the contradictions arising from maintaining the Roman Law language while ascertaining very different solutions for governing laws.

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[64] For a fascinating account for those happenings see Bellomo, Manlio. *The Common Legal Past of Europe: 1000–1800.* Translated by Lydia G. Cochrane, vol. 4, CUA Press, 1995, xiii: "Plurality was thus part of the 'system,' and the system itself was inconceivable and would never have existed without the innumerable iura propria linked to the unity of the ius commune. The greater imperfection of men's laws (the ius proprium) was related to the lesser imperfection of the laws of the rulers of the earth (the ius commune), but both laws, in varying measure, contained and divulged only a tenuous glimmer of the Justice that was absolute, divine, hence eternal."

[65] A concise but dense summary of the movement toward abstraction in contractual theory can be found in: Doris, Martin J. "Did We Lose the Baby with the Bath Water-The Late Scholastic Contribution to the Common Law of Contracts." *Tex. Wesleyan L. Rev.*, vol. 11, 2004, p. 361.

However, their awareness did not prevent the complete reshape of contracts to serve the purposes of a growing speed of transactions. In English Law, that could be the case in the Court of Chancery, as the custodian of an order based on equity, justice, and fairness[66]. Ecclesiastical courts functioned as a compromise solution between a growing number of agreements and the inadequacy of existent actions and remedies to provide justice and fairness, as scholars studying historical sources have been elucidating in the last years[67].

The entire system evolved to enable the enforcement of a wide range of agreements before the courts. Defenses, known as *exceptio* in Roman Law, were the objections that a party could raise against the plaintiff if sued while a holder of specific claims against the plaintiff.

In a system provided with limited actions, the system allowed praetorial evolution of Roman Law through equity and e*xceptiones*[68]. Canonical Law further developed the boundaries of remedies provided by ecclesiastical interpretations on Roman sources, incorporated in the continental *jus commune* and English common law Chancery courts. In its origins, remedies of equity and defenses were sides of the corresponding dressed agreements resistance.

The present work supports the view that the proposed split on defense exercise in contract law expunging the positive function of harmonizing the general with the particular

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66 Atiyah, *The Rise and Fall*, p. 671 ss.

67 Monateri, Pier Giuseppe. *Scintillae Juris: studi in memoria di Gino Gorla*, vol. III. A. Giuffrè, 1994. pp. 1967-1981.

68 Costa, Emilio. *Storia del Diritto Romano Privato*, 3rd ed. G. Barbera editore, 1921. p. 10: *"Dietro alle esigenze della vita, avvertite via via dalla comune coscienza giuridica, ciascun Pretore, come interprete ed organo di questa, poneva in atto nel suo editto ricognizioni di istituti e rapporti non peranco contemplati e protetti dalle norme dei mores e delle leges, o deroghe e distacchi da norme fissate da queste. Le poneva in atto indirettamente, per mezzo di strumenti processuali, ch'egli dichiarava nel suo editto di concedere a tutela di quelli: strumenti che potevano consistere in azioni idonee a farla valere (actio nem dabo, iudicium dabo), o in garanzie atte ad assicurarne l'adempimento (satisdationes),o in altri provvedimenti cautelari (missiones in possessionem), o in provvisori divieti (interdicta), o da difese opponibile ad azione fondate sopra norme di leggi non più rispondenti alle condizioni vive e presenti (exceptiones)."*

case[69] requires the maintenance of state-jurisdictional adjudication because a diverse choice would constitute the system's betrayal to please an imaginary not satisfied market.

The Justinian codification of *pacta*, stated that *exceptio* did not exist as independent rights but just as defenses requiring its exercise in the context of a dispute.

All definitions enunciated by modern contractual theory evolved from that uncomplicated formation. The complexities to set a divide between Civil Law and Civil Procedure originated from the modern attempt to refine and divide categories once amalgamated.

The conceptual quandary to distinguish *causa*, error, breach of good faith, or *bona fides* also derives from that common origin of the elementary form of action. Confronted by the unfeasibility to approach the multiple repercussions from the split of former *actio* and *exceptio*, this study will explore communal passages for both the exceptions and other institutions composing agreements, notably when intermingled with situations that interact with existent exceptions.

A pattern surfacing across multiple jurisdictions is the suppression of once cogent theological influxes that lost their justification and must therefore be eliminated to satisfy market expectations for simplification[70].

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[69] Palermo, Antonio. *Studi sulla "exceptio" nel Diritto Classico*. Dott. A. Giuffré Editore, 1956. p. 88: *"L'exceptio servì così ad introdurre nel campo del diritto sostanziale e processuale nuovi istituti e nuove regole di diritto attraverso la tendenza al rispetto dell'aequitas, di cui l'organo giurisdizionale si fece vivo interprete. Tendenza che non rappresenta soltanto un temperamento della legge nel caso singolo, imposto da ragioni di umanità e benignità, ma costituisce una esatta applicazione di norme giuridiche appartenenti a diversi sistemi, combinate nel caso di specie al fine di assicurare la soluzione giusta nel senso più moderno della parola. Ma accanto a questa funzione positiva la exceptio svolse anche una funzione negativa, intesa quest'ultima nel senso di difesa del convenuto (defendedorum eorum gratia cum quibus cum quibus agitur) che si concreta nel per exceptionem repelli nei confronti dell'attore."*

[70] See the assuring words of Mattei, Ugo. "Basics First Please! A Critique of Some Recent Priorities shown by the Commission's Action Plan." *Towards a European Civil Code*, edited by Arthur Hartkamp, Martjin Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, and Muriel Veldman, 3rd ed. Ars Aequi Libri [u.a.], 2004, p. 297-304: "Legal hegemony of the English language coupled with the imperialism of Economics in social sciences, is conspiring to produce the development of an all-inclusive non-technical notion of contract as a fundamental legal framework for a free market. Contract is successfully competing with institutional ideas of corporation and with public law ideas of hierarchy, in the governance of markets. Outsourcing, downsizing, and privatization, all put an economic notion of 'contract' at the centre of the scene. Contracts are the tool through which the surrender of the political process to market forces is maintaining a façade of legality."

In the *Corpus Iuris Civilis*, the birth of contractual categories enabled enforcing rights before the courts. Lacking dogmatic categories for conceptualizing rights, the Romans envisioned rights as the Law in action[71]. The incorporation of defenses in modern codifications as counterpart's substantive rights, waiving the connection with a future lawsuit allowed the detachment between the exercise of jurisdiction and the claims on substantive rights on behalf of the parties.

For the Romans, enforceability was more relevant than the idea of the right itself. By studying institutes such as *exceptio doli* in the sources on Classic Roman Law, the yawning characteristic that emerges is the prospective lawsuit ensuing from such a defense[72].

In contrast, modern codifications absorbed defenses under substantial rights while causa, good customs, and public order occupied the position not of a right in itself but instead functioning as interpretative clauses, what Palermo called the positive aspect of equity.

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[71] Cogliolo, Pietro. *Saggi sopra l'evoluzione del diritto privato*. Fratelli Bocca, 1885. p. 102-103: *"Ciò che del resto è generalmente ammesso è che i diritti son prima delle azioni, anzi vi è chi chiama quelli diritti primarii o sostanziali, e le azioni diritti secondarii o istrumentali (***) ed il Bentham distingue la substantive law dalla adjective or instrumental law. Logicamente è proprio così: se l azione è uno strumento per far rispettare il diritto, il concetto del diritto deve precedere il concetto dell azione. Ma parmi possa dimostrarsi che la genesi storica è diametralmente opposta alla genesi logica; che il diritto secondario ha esistito prima del diritto primario; che l origine del diritto sta nella procedura; e che per molto tempo il progresso del diritto fu un contracolpo dello sviluppo processuale del quale ebbe tutti i caratteri."*

[72] Costa, Emilio. *L'exceptio doli*. L'erma di Bretschneider, 1970 (ed. Bologna 1897). In his final remarks, the author develops an appealing reasoning regarding the usefulness of *exceptio doli* in the solution of current controversies. He believes in the inapplicability of the institute as used in Rome due to the inexistence of the praetorial figure to supplant the authority of the legal command in the current legal systems. However, his understanding is for the applicability of the institute's logic to resolve conflicts involving good faith between contracting parties. See p. 286-288: "*Può tuttora codesto magistero che descrivemmo dell'exceptio doli, proseguirsi così, quale fu in Roma, nei moderni diritti praticamente? La questione è stata dibattuta in Germania, in relazione con l'altra più ampia intorno all'applicabilità odierna del concetto romano di eccezione. La risposta negativa a quella come a questa, tende però anche in Germania a prevalere. E sembra, a noi pure, giustamente; dacché manchi oggidì l'organo essenziale da cui l'eccezione vera emana: il pretore; né potendo per alcun modo l'odierno magistrato allontanarsi, nel riconoscere un rapporto del convenuto che contrasti al diritto dell'azione, dalla tassativa disposizione della legge, nè pero, fuor di questa e di propria autorità, prestare accoglimento a nuovi bisogni affermantisi nella vita, e richiedenti la trasformazione degli istituti che la legge disciplina, o la configurazione di nuovi; salvo altrimenti incorrere nel pericolo di quell'aequitas cerebrina, [...] Mutato è lo strumento, con che la coscienza giuridica avverte i nuovi bisogni: ben altri elementi influiscono a creare e ad evolvere questi di continuo. Ma l'esempio del modo con che Roma seppe provvedere a comporre conflitti via via avanzantisi, con un'exceptio data dalla mala fede in chi agisce, può porgere, a chi ben li intenda, datti tuttora preziosi a comporre i nuovi conflitti, coi mezzi che i mutati strumenti della coscienza giuridica e i diversi bisogni consentano."*

Even though notions such as causa, good custom, public order are elements that must be present or should be absent to achieve the formation of a valid contract, they perform an essential role as channels to conciliate the needs of certainty and justice. The meaning of interpretation here emphasizes the role of judicial-making on those notions of equity absorbed under substantives that today present themselves disconnected from its original source.

The reforms proposed in Italy and already implemented in the French legal tradition differ significantly from the common law[73]. Yet, despite dissimilarities, the U.S common law system was a resonance engine from international organizations to spread tendencies. Especially on regards to the North American common law, where the judge-make-law is the main motor of the system's progress, equity accommodates itself to the system from the jurisprudential orientation[74].

Those reforms remove the possibility of jurisprudential guidance in the system to allow a better distribution of risks, not concerned just with economic-analysis assessment, but with

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[73] Recent reforms were undertaken in Italy and France following Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, corresponding respectively to Legge 26 novembre 2021, n. 206 (*Delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonche' in materia di esecuzione forzata*) and Ordonnance n° 2016-131 du 10 février 2016 *portant réforme du droit des contrats, du régime général et de la preuve des obligations* and . Loi n° 2016-1547 du 18 novembre 2016 *de modernisation de la justice du XXIe siècle*. Available at: Italian provision Gazzetta Ufficiale https://www.gazzettaufficiale.it/eli/id/2021/12/09/21G00229/sg. French Loi n° 2016-1547 du 18 novembre 201: https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo/texte; Ordonnance n° 2016-131 du 10 février 2016 https://www.legifrance.gouv.fr/eli/ordonnance/2016/2/10/JUSC1522466R/jo/texte. On the Directive https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32008L0052. Access January 16, 2022. As will be examined, the correlation posed between the suppression of institutes of complex operationalization and the reform in the direction of alternative dispute resolution is clear.

[74] Although the migration to alternative dispute resolution marginalizes countless disputes that require an equitable approach to meet the primacy of justice. The author's vision is also current with respect to the conversion of the litigant into a patient to be treated, his excessive litigiousness as a motto for the harmonization of the system and the standardization of disputes. See Nader, Laura. *The life of the law: Anthropological Projects*. University of California Press, 2002. p. 141: "One might indeed conclude that as a result of the effort to repress Vietnam protesters and quell the rights movements of the 1960s, harmony became a virtue in the United States. To be more 'civilized,' Americans had to abandon the adversary model. Relationships, not root causes, and interpersonal conflict resolution skills not power inequities or injustice, were, and still are, at the heart of ADR. In ADR, civil plaintiffs are perceived as "patients" needing treatment, and when the masses are perceived in this way, policy is invented not to empower the citizen but to treat the patient. There was a movement from an interest in social justice to primary concerns over harmony consensus and efficiency."

equity as an orientation judicial postulate. The system elected exceptions, such as hardship clauses, a more solution-oriented and prone to the risk-allocation Law and Economics approach, rather than cause, morality, good customs, and all the theological-saturated meanings, to provide a solution to disregard non-incentivized moral values on juridical choices.

The reformulated system's values election, such as good-faith rather than categories equity-oriented[75], left a permanent fraction on two branches equally crucial of the Law[76], one addressing predictability and the other the permanent pursue of equity's aspiration. Those jurisdictions aim to adapt the judge, or rather the state judicial power, to a "*bouche de la Loi*" as if making social conflicts escape state judicial control would become possible to achieve the system's predictability of new social relations. Some of those changes directly result from courts decisions since the system requires incorporating judicial decisions to advance the Law, but those same decisions are now deprived of once metaphysical concerns[77].

As stated above, following Palermo's classification, the Roman Law system follows an amorphous substantial/procedural divide of *aequitas* as the positive side, having the *exceptio* as negative defenses to temper the duress of the Law, the reason why there is a monumental challenge to set the dividing lines between them. It has been the role of jurists to mitigate this divide, providing the logic that satisfies historical sources and the insertion of those precepts on modern Law.

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[75] Zimmermann, Reinhard. "Diritto romano, diritto contemporaneo, diritto europeo: la tradizione civilistica oggi." *Rivista di diritto civile*, vol. 47, 2001, pp. 703-763. See also Franzoni, Massimo. "Buona fede ed equità tra le fonti di integrazione del contratto." *Contratto e impresa*, vol. 83, 1999.

[76] On the divergent development of good faith and the difficulty of reconciling with the demand for harmonization see Teubner, Gunther. "Legal irritants: good faith in British law or how unifying law ends up in new divergencies." *The modern law review*, vol. 61, no. 1, 1998, pp. 11-32. See also Monateri, Pier Giuseppe. "Contratto rugiadoso e contratto rude nel diritto europeo e comunitario." *Buona fede e giustizia contrattuale. Modelli cooperativi e modelli conflittuali a confronto*. D'Angelo-Monateri-Somma, Giappichelli, 2005.

[77] The Force of Law, p. 270: "The law [loi], is transcendent and theological, and so always to come, always promised, because it is immanent, finite, and thus already past. Every 'subject' is caught up in this aporetic structure in advance."

As Busnelli asserted[78], equity and good faith were tied together under Roman Law and would proceed performing the same function if the rebuilding of Roman Law kept the same paths among the European countries bearing its tradition. However, by comparing the continental legal tradition and the common Law, it becomes noticeable that some biases prevented equalizing its proper functions.

The positivist's perception preventing judicial making power to use general clauses to correct duress created a false opposition between the systems, already corrected through deploying rigid theories sustaining good faith usage as interpretative, supplementing, and corrective function in the formation of a contract as it is in Section 242 of the BGB[79].

In this progression, good faith became palatable for the positivist attempt to contempt the interpretative role of judges[80]. At the same time, equity and its force on the English courts left the sensation that correcting fairness employing this long English tradition would disarrange the Enlighted balance of powers coming out from the French Revolution.

As it was later ascertained, neither is the Judiciary the least dangerous branch, nor the judge the guardian of promises, in allusion to Bickel and Garapon works respectively[81]. By the same token, common law judges were also bound by the authority of previous rulings, generating the exact outcomes of doctrinal evolved theories of good faith's reach, enabling Law's advancement.

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78 Busnelli, Francesco Donato. *Note in tema di buona fede ed equità. Il ruolo della buona fede oggettiva nell'esperienza giuridica storica e contemporanea atti del Convegno internazionale di studi in onore di Alberto Burdese Padova, Venezia, Treviso, 14-15-16 giugno 2001): Convegno internazionale di studi in onore di Alberto Burdese*. 2003. Also, in *Rivista di Diritto Civile*, 2001, 5, 10537.

79 Canaris, Claus-Wilhelm. Die Vertrauenshaftung im Deutschen Privatrecht. Beck, 1971, pp. 5.

80 Hesselink, Martijn W. *The Concept of Good Faith. In Towards a European Civil Code*, edited by Arthur Hartkamp, Martjin Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, Muriel Veldman. 3rd ed. Ars Aequi Libri [u.a.], 2004. p. 471-515. The author well summarizes the stage of good faith in different contexts, presenting how the doctrine that examines the BGB expanded the scope and the multiple developments of good faith, concluding, however, that the expansion of such institute generates by result the unfeasibility of the sense under which such "clause" was conceived. Apparently, as it will be explained further on, good faith found in modern systems what the exceptio *doli generalis* could not find. However, on further reflection, the power is gradually being returned to the judges, who do not necessarily wear the toga of judges invested by the State.

81 Bickel, Alexander M. *The least dangerous branch: the Supreme Court at the bar of politics*, 2nd ed. Yale Univ. Press, 1986. Garapon, Antoine. *Le Gardien Des Promesses: Le Juge Et La Démocratie.* O. Jacob, 1996.

Categories of Contract as a Proxy for Miscellaneous Cosmogonies[82]

In the quest to consolidate a Law that absorbed the various influxes originating from the development of the Law over centuries, allied to the discovery of the *Corpus Iuris* and the interpretation through theological doctrine, the schemes that would compose the Civil Law disregarded contradictions to achieve the elegance contained in the first fruit of those theories, the Napoleonic Civil Code.

The core of the Roman system, later found by the glossators in the Digest, was the reliance on *pacta vestita* to generate predictability, evaluating what agreements were enforceable[83]. The Roman precept falsa causa *non vitiat* recognized in parallel to the act's invalidity when in the presence of false or impossible conditions required Scholastic tradition massive efforts to conciliate both[84].

The deployment of Aristotelic and Thomistic understanding on *causa efficiens* and *causa finalis* to pave the way to the categorical unification of cause enabled dressing the *pacta* in what would later become the Domat-Pothier concept of an enforceable agreement[85]. Hence, with scholastic doctrines from Saint Thomas of Aquinas, grounded on Aristotelic conceptions

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[82] Peirce, Charles S. "The architecture of theories." *The Monist*, vol. 1, no. 2, 1891, pp. 161-176. See also Shapiro, Gary. "Peirce and Derrida on First and Last Things." *University of Dayton Review*, vol. 17, no. 1, 1984, pp. 33-38. Cosmogony deployed for contractual theories stands for the multitude of contractual origins legends. Was the original covenant a sacrificial blood one?

[83] Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Traditions*. Oxford University Press, 1990. p. 6: "since Roman Law was an actional law, it mattered little whether an agreement was to be regarded as binding if no suitable procedural formula was available to enforce it."

[84] Meijers, E. M. « Les Théories Médiévales Concernant La Cause de La Stipulation et la Cause de la Donation. » *Études d'Histoire du Droit*, Tome IV Le Droit Roman au Moyen Age. Universitaire per Leiden, 1966, p. 107-131.

[85] Gordley, James. *The philosophical origins of modern contract doctrine*. Clarendon Press, 1991. p. 49: "As we shall see, in all likelihood Bartolus and Baldus formulated the doctrine with this distinction in mind. Nevertheless, they were not attempting to explain Roman law systematically by Aristotelian principles. They merely found Aristotle helpful in interpreting their Roman texts. One key text stated: 'When there is no causa, it is accepted that no obligation can be constituted by an agreement; therefore a naked agreement does not give rise to an action although it does give rise to a defence (*exceptio*)."

of causa, the agreement relying on cause replaced the former closed enumerated agreements under Roman Law[86].

However, the scholastic endeavor of refining Roman Law under the emerging theologic doctrines was also accompanied by a continuous secularization of the Law through the hands of the Dutch, which reached its apex in Hugo Grotius' school of Natural Law[87], estranging the harmonization ambition and fostering equity and fairness.

Even though the Roman categories and the reliance on a cause to justify the legitimacy and good faith of an agreement were contradictory, the jurists developing the scholastic and later Natural Law school kept their consistency and unity under the authority of Roman sources of Law. Still in the cradle, the Dutch School was unwilling to take the obstacles offered by the distinguishing naked and dressed pacta. They favored a more transactional approach of agreements to benefit the growing number of contracts outside the scope and pursuits of Roman Law tradition[88].

As pointed out by Reinhard Zimmermann, within the 18th Dutch School, Samuel Stryk remarked a deviation in the logic of *exceptio* for unnamed contracts in Roman Law and the consequences of lifting the need of pacta vestita while preserving the exceptions for the applicable Law of his time[89].

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86 Bärmann, Johannes. « Pacta sunt servanda. Considérations sur l'histoire du contrat consensuel. » *Revue internationale de droit comparé*, vol. 13, no. 1, 1961, pp. 18-53. See also Supiot. *Homo juridicus : Essai sur la Fonction Anthropologique du Droit*. Verso, 2007. p. 86.

87 Grotius, Hugo. *The Jurisprudence of Holland. The text translated with brief notes and a commentary by R. W. Lee*, vol. II. Clarendon Press, 1936. p. 270: "It will be remarked how Grotius diverges from the Roman Law in his treatment of this topic. He refers to one general class, to which he gives the name of 'promises (or contracts) by operation of law', not merely most of the situations which in Roman Law are considered under the head of *obligations quasi ex contractu,* but also all the usual real and consensual contracts of the Roman Law together with some others, unknown to the Roman Law or not usually referred to the head of contract in that system." P. 232: "redelocke oorzaecke. The connexion of ideas (which is obscure) seems to be as follows. Grotius has just said that the formal stipulation of the Roman Law is no longer in use. All that is required is reasonable cause. From the stipulation he passes on to *pacta*, and adds that this condition of reasonable cause is satisfied by the *pactum donationis* and by the *pacta adjecta* of the Roman Law, i.e. promises accessory to another promise."

88 Barton, John. "Introduction." *Towards a General Law of Contract*. Duncker & Humbolt, 1990, pp.7-14.

89 Stryk, Samuel. *Operum Praestantiorum Collectio Nova: I. Vsvm Modernvm Pandectarvm, II. Cavtelas Testamentorvm, III. Cavtelas Ivramentorvm, IV. Tractatvm De Svccessione Ab Intestato Continens*. Vol. 1. Orphanotropheum, 1746, Lib. II. Tit. XIV, § 5, p.83. In this passage from *Usus Modernus Pandectarum* Stryk

The theory of causa in continental civil Law tradition and consideration in common Law, not without dispute over the utility of preserving the system as if it had no contradictions, was the glue for the coexistence of exceptions while requirements to bring contracts into reality were lifted[90]. The problems resulting from the addition of causa as a cure for the Roman remnants, as Giorgio Giorgi and Gino Gorla would later elaborate in the 20 century, would be deemed the fourth side of a triangle.

The solution was to look at the Roman text and adapt the Aristotelic and Thomistic concept of cause from *pacta nuda* into *pacta vestita* to make it sound according to the most advanced pace of transactions. The solution seemed appropriate to conform with the possibility of accessing ecclesiastical courts at the same investing in Roman Law authority.

The contradiction of *ex nudo pacto actio oritur* transported to our current system to conceal the debate over the origins of a bare agreement entrains to the modern controversy on the entire edifice of the exceptio on Private Law[91]. That is the case because Domat and, lately,

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espouses the view that penance, or in the modern sense of the term penalty, should not follow the innominate contract. ZIMMERMANN, Reinhard. The Law of Obligations: Roman Foundations of the Civilian Tradition. Juta & Ltd. 1990, p 578: "This jus poenitendi (as it came to be called) featured prominently whenever in the centuries after the reception of Roman law in Europe the exact confines of the principle of pacta sunt servanda were discussed. Down to the 19th century, there was support for it retention. Other authors had realized, however, that the application of special rules for innominate real contracts did not make sense once the enforceability of all pacta (nuda) had become generally recognized.

90 Our modern law inverted the poles' discussion because it made breach a sin while admitting multiple situations in which parties are exempted from their promises. It also made sin the exception from which a significant part of the substantive law derives. See Gordley, James. "Good Faith in the Medieval *Ius Commune.*" *Good Faith in European Contract Law*, edited by Reinhard Zimmermann and Simon Whittaker. Cambridge University Press, 2000, pp. 99-100: "Moreover, the Canon lawyers did not say that every agreement was enforceable even in Canon law. As Astuti notes, they said little about the matter because, unlike the civilians, their prime concern was not whether an agreement was actionable but whether breach was a sin. As late as the fourteenth century, Baldus could still claim that the Roman distinction between contracts consensus and re was part of Canon Law.

91 Consensualism's consolidation replaced pre-defined contractual forms. That process was long and required codification to entrench the idea that promises were binding regardless of the form contract would take. Very diverse dimensions of the Law, state contractual formation, and the private agreements having the force of Law among parties were part of the same generalizer phenomena. See Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Traditions*. Oxford University Press, 1990. p. 576: "A Final word on *pacta sunt servanda*. We have seen how the praetor's promise, as related by Ulpian in D.2, 14, 7, 7. Was turned into this general maxim by the canon lawyers. Its import was, first of all, to assert the principle of consensualism: all pacts are binding. Regardeless of whether they are clothed or naked. However, once this principle had generally gained acceptance, the significance of 'pacta sunt servanda' shifted slightly. The maxim was now taken to imply that contractual promises must under all circumstances be honored."

Pothier relied on the same theory to bring about an utter system of agreements based on the will. At first, the system encountered the need to justify donations under the disguised gifts solution[92].

Searching for a *lex mercatoria* and the uniformization of contracts highlighted inconsistencies almost impossible to overcome[93]. The contradictions grew in number and variety resulting in the French paramount reform suppressing definitions considered to be "*formulations sont aujourd'hui désuètes*"[94]. In the same opportunity, reformers justified the elimination of traditional constructions under the need to incorporate jurisprudential interpretation, contemporary understanding of good faith and to establish clear venues for reassessing terms of contracts facing a situation of imminent default.

The reform substantiated the condensation of disarranged theories in the same legislative document, indicating that those theories are indeed part of a core justice theory expanded over the centuries.

Consequently, the suppression of *causa* and *bonnes mores* [95] were accompanied by the coming into force of the discipline on *force majeure* and *hardship clauses*[96], not to mention pre-contractual obligations, constituting this logic the reason for emphasizing the study of exception aligned with the past theories that enabled the lifting of given promises.

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92 Dawson, John P. *Gifts and promises: Continental and American law compared*. Yale Univ. Press, 1980. p. 74-121.

93 See Gannagé, Léna. *Le contrat sans loi en droit international privé. General Reports of the XVIIth Congress of the International Academy of Comparative Law*. Utrecht/Brussels: Eleven Int./Bruylant, 2007.

94 "Rapport Au Président De La République Relatif À L'ordonnance N° 2016-131 Du 10 Février 2016 Portant Réforme Du Droit Des Contrats, Du Régime Général Et De La Preuve Des Obligations - Légifrance". 2022. Legifrance.Gouv.Fr. https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032004539/. Access January 18, 2022.

95 Guarneri, Attilio. « La scomparsa delle bonnes moeurs dal diritto contrattuale francese. » *La Nuova giurisprudenza civile commentata*, vol. 33, no. 3, 2017, pp. 404-414. See also Terlizzi, Giulia. « Le nozioni abbandonate. » *La rivoluzione delle parole nella riforma francese del diritto dei contratti*, 2017, pp. 695-724. Deshayes, Olivier ; Genicon, Thomas ; and Laithier, Yves-Marie. "La Cause a-t-elle réellement disparu du Droit français des Contrats?" *European Review of Contract Law*, vol. 13, no. 4, 2017, pp. 418-430.

96 Perillo, Joseph M. "Force majeure and hardship under the UNIDROIT principles of international commercial contracts." *Tul. J. Int'l & Comp. L.* 5 (1997): 5.

Debates favoring the suppression of causa encourage the introduction of legal institutions offering more satisfactory solutions for current contractual forms – indifferent to moral values dictated by the church – propitiating in its turn the removal of metaphysical explanations existent in the theory of causa. The original support for excepting oaths in a differentiated system of justice degraded into forms which do not require complicated Aristotelian constructions[97].

Thus, the notion of *causa* and the fossilized naked pact accounts for a broader narrative than merely justifying present-day reforms. The success of massive remaking of contractual theory finds the perfect test during events affecting multiple actors, such as wars, economic crashes and more recently a global pandemic, situations in which losses are spread among multiple parties and disturbances impacts a wide range of agreements. In those situations, rationally allocating losses applying corrective open-texture clauses are insufficient[98], and usually the State appears again as the guarantor of broken oaths. The Law evolves with the aspiration of improvement, but decades are needed to unveil the consequences of its metaphysical mutilation.

What seemed to be a persistent incongruity of the system, presents itself as a rather secure source of refuge when Law distress under Law and Economics inputs loses its capacity to solve controversies. Moreover, familiarity is a factor of safeguards against unpredictable times for that task.

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[97] Establishing in the Italian literature a consistent connection between exceptio doli, buona fides and the relevance of the emergence of the theory of causa in consensus-based agreements see Meruzzi, Giovanni. *L'Exceptio Doli dal Diritto Civile al Diritto Commerciale*. CEDAM, 2005. p. 156-159. See also Gordley, James. *The philosophical origins of modern contract doctrine*. Clarendon Press, 1991. p. 6-7.

[98] Open texture here derives from Hart, H. L. A.; Hart, H. L. A.; Raz, J.; & Green, L. *The concept of law* (1961). Oxford University Press, 1994. p. 126: "Canons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these canonsare themselves general rules for the use of language, andmake use of general terms which themselves require interpretation."

Agreements expose multiple situations. A party could fabricate their intention to deceive the other or manifest a will that materially is not attainable[99]. Eventually, a change of circumstances would justify a claim of not enforceability of the contract. An error could also present itself as a justification for not performing the obligation that arose from the contract.

The construction of contractual Law defied its Roman sources. It replaced agreements nominated forms with God as the guarantor of all promises and the church as a legitimate authority to verify compliance with words given[100].

At first, the transcendent aspect of conformity was visible since the verifiability to God's commandment relied on reasons outside rationalized justification[101]. The category of *nudo pacta* and dressed pacta existed to propitiate the exercise of the right of action. Centuries were needed to build a theory legitimizing that promises should be kept above all, converting the exceptions in exceptions from the will. Tendency went in the direction of making promises enforceable[102]. The church had a prominent role in spreading the enforceability of promises, followed by temporal sovereign power, concentrating the capacity of equalizing relationships through a one Court system assigned by the ruler.

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[99] Benjamin, Walter. "Il dramma Barocco Tedesco." *Opere Complete, II. Scritti 1923-1927*, edited by Enrico Ganni. Einaudi, pp. 69-268. p. 105: "Dal ricco sentimento vitale proprio del Rinascimento se emancipa il suo elemento dispotico-mondano, per sviluppare fino alla restaurazione insieme ecclesiastica e statale. Una di queste conseguenze è l'esigenza di un principato il cui status giuridico-politico garantisca la continuità di quella vita associata che fiorisce attraverso le armi e le scienze, le arti e il clero. La mentalità giuridico-teologica che contraddistingue l'intero secolo esprime quella tensione irrisolta verso la trascendenza che sta alla base del Barocco storico della Restaurazione si contrappone frontalmente, nel Barocco, l'idea di catastrofe. E proprio su questa antitesi viene coniata la teoria dello stato d'eccezione. Così, se si vuole spiegare come mai <<la viva coscienza del significato del caso eccezionale, che domina il giusnaturalismo del XVII secolo>>, vada in seguito perduta, non sarà sufficiente chiamare in causa la maggiore stabilità politica del secolo successivo. Se infatti, <<per Kant…il diritto d'eccezione non è più affatto un diritto>>, ciò dipende dal suo razionalismo teologico." Kant's moral imperative applied to the right to lie concludes that lying can never become an imperative category because that would make interactions impossible.

[100] See Bellomo, Manlio. *The common legal past of Europe, 1000–1800*, vol. 4. CUA Press, 1995. p. 47.

[101] Supiot, p. 162.

[102] Fried, Charles. *Contract as Promise: A Theory of Contractual Obligation*. Harvard University Press, 1981. p. 19: "The promise principle was embraced as an expression of the principle of liberty – the will binding itself, to use Kantian language, rather than being bound by the norms of the collectivity – and the award of expectation damages followed as a natural concomitant of the promise principle."

This study bears the premise that the hermeneutic arrangement allowing enforceability of naked covenants left the exception's situation unresolved[103]. Moreover, since many exceptions are identifiable across multiple jurisdictions, it propitiates a fruitful comparative study, of how systems react when confronted on contractual unforeseeable situations. It is also retraceable to the Roman Law and amalgamates substantial and procedural intercurrences. By the same token, its ontology established a relationship with exceptions absorbed by Civil Law and expanded to a broader discourse on jus commune and *jus singulare*[104].

On closer reflection, it is possible to see that the current forms of reproduction of phenomena in the procedural sphere are nothing more than staging an invented reality. When the judge sits on the bench and assumes feasible objectively accessing the body of evidence, he performs a ritual simile to one who executes ritualistic magic acts.

However, witchcraft, the symbolism, supposes a certain triggering of facts that mimics reality. In this sense, the power that his authority symbolizes is no different from the mystical aspect that the conclusion of contracts imposed before Roman Law[105].

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[103] Buckland, W. W. *A textbook of Roman Law from Augustus to Justinian*, 3rd ed., revised by Peter Stein. Cambridge University Press, 1963. p. 625-626: "The rigid formalism and consequent inexpansibility if the *legis actio* was unsuited to the needs of advancing civilization. Still less was it suited, since its forms and ceremonies were to a great extent secrets in the hands of patricians magistrates and pontiffs, to the plebeians, steadily growing in strength. The opening if various magistracies to plebeians and the publication if the Calendar and other information by Cnaeus Flavius, about 300 B.C, did something to help them, and when, half a century later, a plebeian *pontifex maximus* expounded the law publicly, all the value of the system, even to patricians, was gone. Only its inconveniences were left, and it was superseded by the more rational Formulary System. Simplification had already begun within the *legis actio* itself, by the introduction of actions *per sponsionem*, a method of evading the real action by *sacramentum*."

[104] As a reference to the application of the *jus singulare* in cases of war, it is fundamental to examine the writings of Cogliolo, Pietro. *Legislazione di Guerra nel Diritto Civile e Commerciale con una parte speciale sopra la colpa, i danni, la forza maggiore. Raccolta completa di tutti i decreti-legge in rapporto al Diritto Privato*, 2nd ed. Unione Tipografico-Editrice Torinese, 1917, p. 95: "Nessuno ha mai dubitato che il diritto romano rappresenta anche dal punto di vista dell'intrinseco ordinamento giuridico un'opera secolare che fu d'insegnamento ai popoli che vennero poi, e che merita di esserlo ancora. Quel diritto aveva creato non per lavorio mentale dei giuristi, ma come effetto storico dell'evoluzione giuridica la distinzione tra *jus commune* e *jus singulare*, dei quali diritti, malgrado le molte dispute che si fanno in dottrina per precisarne i concetti, può darsi questa idea fondamentale, che il diritto comune è quello che contiene una norma generale, mentre il diritto singolare è quello che contiene una norma generale, mentre il diritto singolare è quello che, pur regolando un numero grande di casi, contiene una norma che è una eccezione di fronte alla prima."

[105] See MacCormack, Geoffrey. "Formalism, Symbolism and Magic in Early Roman Law." *Tijdschrift voor Rechtsgeschiedenis*, vol. 37, 1969, p. 439.

The whole modern contract theory departs from the premise that fictions such as the meeting minds occur in all contractual relationships. The Romans accounted for the existence of consent. Nonetheless, under exceptional situations consent would suffice as future defenses. Society evolved to repudiate exchange of bronze or solemnities accompanied by the recitation of sentences carved from *Mancipatio* and *Stipulatio* perfectionating a transaction. Although, it still relies on fiction to give force to online terms and conditions' agreements.

The dressing of pacts was the operational device through which disputes were empowered to appear before the courts[106]. The same rational applies to the exceptions, once dressed as rights instead as defenses.

Moreover, since society is now divided into two private realms, the past analogic one and the unfolding cyberspace dimensions forming a pluralistic legal system, this fiction becomes more evident. Since its transferability to unimagined contracts allows similar analogies as those conceived with the expansion of *nudo pacta*, dressing those agreements with the appropriate causa corresponds to reframing categories not fitting properly to a changing world.

The state of exception in Private Law is a point of non-return. It serves both to elucidate the past and shed light on an unknown future, an ever-expanding category that jostles on open-texture solutions such as good faith but, instead of promoting elected values, evades it.

As explained by Schulz, while digressing on Riccobono's work, the simplification process undertaken by the Justinian compilation was extensive. It consisted in the unification of *ius civile* and *ius honorarium*, the destruction of *actio* and *exceptio*, among other

[106] Stein, Peter. *Legal Institutions: The Development of Dispute Settlement*. Butterworths, 1984. p. 199: "The oath was therefore a device for giving jurisdiction to a better qualified court. The canonists developed the doctrine that a promise which had been freely made should be binding on the promisor, whether or not it was supported by an oath, so long as there was a serious purpose or reason for it (causa). They also moved towards extending to all contracts the idea of 'good faith, which in Roman law was confined to particular contracts."

obliterations adopted "inconsequently and without a plan"[107]. This process was exhaustively documented in Romanist literature.

However, its leap to contemporary disciplines requires an effort only justified when present modifications disrupt the very basis in which the system was erected. The apertures of Civil Law and Civil Procedure impinge upon each other to the point of obnubilating the function of the established distinction in present-day analysis.

The trajectory of the exception will provide a broader understanding of diverse phenomena that span multiple jurisdictions with a fundamental problem affecting every command.

Shifting the discourse from rules to exceptions emphasizes the need for flexibility and adaptability in law, recognizing that rigid rules may not always yield fair or just outcomes, as it is impossible for the legislator or the contract's drafter to anticipate every possible situation affecting contractual balance. The inherent complexities and ambiguities in human interactions propel the need for a legal framework that accommodates change but not in the reductionist framework that aims to blend all the systems into an oppressive simplistic scheme. Facilitation can also function as a device for suppressing dissent, as the pure theory of will has demonstrated.

In that regard, Hart speaks directly to this shift in legal focus. As Hart argues, a purely rule-based system fails to consider the 'open texture' of language and the necessity for judicial discretion in cases where rules may be indeterminate[108]. A focus on exceptions recognizes this need for discretion and the ability to adapt the law to novel or unanticipated circumstances.

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[107] Schulz, Fritz. *History of Roman Legal Science*. Clarendon Press, 1953. p. 293. See also Riccobono, Salvatore. "V. Stipulatio ed instrumentum nel Diritto giustinianeo." *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, vol. 43, no. 1, 1922, pp. 262-397 and "La fusione del ius civile e del ius praetorium in unico ordinamento." *Archiv für Rechts-und Wirtschaftsphilosophie*, 1922, pp. 503-522.

[108] Hart, H.L.A. *The Concept of Law*. 2nd ed., Oxford University Press, 1994, p. 126.

In a diverse disciplinary environment, Bruno Latour's ethnographic study of the Conseil d'Etat provided an insightful critique of the dichotomy of rules and exceptions. His notion of 'law in action' exposed a discourse of a more vibrant set of interactions allowing for the construction of decisions that were far from the static set of rules one is accustomed to believe as the Law and its making[109]. In this view, deviation and improvisation are not perceived as aberrations from the norm but as integral parts of the legal process. These will be juxtaposed with the origins of exceptions and the implications that arise when the state no longer guarantees the contract's content, thus affecting the predictable development of relationships and the governing of normality.

Though not only, by exempting itself from the adjudicative role, it also divests its primary function of deciding on exceptions, since the jurisdictional exercise is essential to exceptions' manifestation. The exceptions only present themselves before the impasse and uncertainty.

From this understanding, a new kind of borrowing appears, in which legal systems that replicate other jurisdictions are ahead in the changing process, given that they have never aspired the position of geopolitical disseminators of a legal architecture, their greatest vocation was being adaptive to the actors' demands operating in the system.

Once transplant receivers are not preoccupied with maintaining their legal traditions, they accelerate the speed of borrowing according to needs outside the Law. From that perspective, it is feasible to establish a new correlation. Former exporters renounce attachment to consolidated tradition to comply with replicators and the external pressure for change.

On the assumption that the present study is one of reconstruction serves the purpose and constitutes an object for a better understanding of the subject, the deployment of historical sources, repealed laws and laws in force in different jurisdictions where traces of the past can

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[109] Latour, Bruno. *The Making of Law: An Ethnography of the Conseil d'Etat*. Polity, 2010, p. 65.

be found. Based on the previously held view that isolated legal diplomas do not explain the reality underlying their edition, the literature present in the History of Law in Roman and Comparative Law is indispensable to achieve the expected outcomes on framing the exception.

In modern theory, a contract's exception arises when a promise is no longer enforceable and the power to decide on the consequence for the breach is transferred to a third party[110]. The role in deciding on the exception consolidated in the hands of the state, but recent modifications shifted the former power relationship.

By assuming the duty of composing the parties and discharging the agreement's force, the third party has the authority to replace the force of the original agreement. Despite the perils and state-enforced agreement, the arrangement had the advantage of replacing the church and local's authorities in feudal society.

The continuous change assumes a distinct appearance, not the judge nor the church, and is not recognized as resembling the state. Its widespread presence does not conform with territorial boundaries or geographical jurisdictions. Besides, the chamber's decider does not grant authority for jurists or former pretorial decisions as Papiano would assert and where Wieacker found resonance to orient his theoretical framing on good faith[111].

The exception stands for the institutions enabling the discharge of promises and devices backed by force and prestige. In an algorithmic framing, force is the exception if a rule is normality. The seal was once used to ensure the exclusive power granted to nobility to enter enforceable agreements. Peasants, having no seals[112], were not able to engage in transactions involving written promises.

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[110] Hogg, Martin. *Promises and Contract Law: Comparative Perspectives*. Cambridge University Press, 2011, p. 117: "This means that, while the glossators developed the doctrine of causa, teaching that the absence of causa did not simply give rise to a defence (the exceptio doli) as in classical Roman law, but meant that the contract was seen as invalid ex nunc, they did not put causa to the same Aristotelian uses as later scholars were to."

[111] Wieacker, Franz Von. *Zur rechtstheoretischen Präzisierung des § 242 BGB*. Prof. der Rechte in Göttingen. Verlag J.C.B. Mohr Paul Siebeck, 1956.

[112] Esmein, A. « Un Chapitre de L'Histoire des Contrats em Droit Anglais. » *Nouvelle revue historique de droit français et étranger*, vol. 17, 1893, pp. 555-566.

Without the metaphysics of superior divine authority or the state as the ultimate source of decision, the central problem already framed in Public Law of who decides on the exception becomes a central issue also in Private Law[113].

Some challenges arise above the complications of selecting exceptions instead of rules, but they are mitigated while assessing exceptions as the current form of transactions among parties. The era of the civil codes concealed the origins of contracts since it established that a contract is a manifestation of will among the parties entering a deal.

Therefore, centering the whole framework of agreements in formalities went against this precept. The fragments of the Roman Law studied by the canonists and lately scholastics showed that the essential features of contracts were the names enabling the contracts to become an action before the praetor and the *iudex*.

The primordial rule was to perform sacralized rituals and procedures, sayings, and memorized formulas, enabling the contract to satisfy a name previously instituted as a contract. The parties had an assumed intention externalized in the corresponding recipe in this respect. According to Roman Law, the allowance to bring claims not previously instituted as actiones constituted the exception.

Domat's thoughts regarding contract formation incorporated in the French Civil Code is the culmination of a long process of making the exception Law. The conception of the meeting of minds as the essential notion lying on contract formation enshrouded a cornerstone of contract asserting that *Ex nudo pacto actio non oritur*[114].

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[113] Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty, [1922]*, translated by George Schwab. MIT Press, 1985.

[114] Supiot, Alain. *Homo Juridicus : Essai sur la fonction anthropologique du Droit*. Éditions du Seuil, 2005. pp. 152-153 : "Les glossateurs médiévaux ont repris à leur compte l'adage *Ex nudo pacto actio non nascitur*, et édifié sur lui leur théorie des *vestimenta pactorum*. Puisque, selon la formule d'Accurse, le pacte nu est comme une femme stérile, il s'agit de le bien vêtir pour qu'il enfante des droits. Certains pactes <<sont gras et chauds de nature et un rien suffit à les habiller>>, comme la vente ou le louage, où le Droit roman voyait déjà des contrats consensuels. Pour les autres, il faut des vêtements moins légers que le simple *consensus* : la *res*, les verba, la *cahaerentia*, la *rei interventus*… C'est de cette théorie des *vestimenta* que Loysel se gaussera au XVI siècle, lorsque après avoir donné au consensualisme sa plus célèbre image – <<On lie les bœufs par les cornes et les hommes par les paroles>> -- il ajoute : <<et autant vaut une simple promesse ou convenance que les

Defenses and actions that seek to undo an agreement are exceptions. While the continental regime attempts to eliminate cause in contracts, consideration is still a cornerstone of common law.

Before such an unprecedented moment in history where boundaries are blurred and categories supplanted in favor of more "practical" solutions, the need of retreating to Roman foundations is augmented. Beyond discontinuities and changes that arose from the ius commune[115], the system was substantially replicated and did not overgo a massive modification that would justify the suppression of categories still applicable for current issues.

As a consequence, the system produced a significant challenge for the suppression of categories created to mitigate the attenuated formulation of the nudo pacto. For the legal systems that opted towards a premise of nuda pacta being enforced before the Courts, it was required the insertion of requisites that were not as much the concern of Justinian compilation since concepts such as scholastic/Aristotelian cause were not yet entrenched in the juristic minds. The basis forming consent or meeting of minds in contracts substituted the need for extended formalities and the rigid forms of contracts previously existent.

Among the puzzles to be solved in the study of the exception, resides the maxim that the exception confirms the rule on a linguistic level and on the massive effort needed to recollect the connection between the original exception of *nudo pacto* and all the developments following the *exceptio* on the juridical level.

The reason why scholars opted not to establish a parallel between the original *exceptio* arisen from classical sources in Roman Law and the ones present on contemporary forms of legal institutions find numerous explanations. The growing variety of exceptions arising from

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stipulations du Droit romain>>. C'est qu'entre les glossateurs et Loysel, le principe s'est proprement inversé et que l'on admet désormais, à rebours du Droit romain, *qu'ex nudo pacto, actio oritur* (du pacte nu naît un droit d'agir en justice)."

[115] Coing, Helmut. "The Sources and Characteristics of the Ius Commune." *The Comparative and International Law Journal of Southern Africa*, vol. 19, no. 3, 1986, pp. 483–489.

the transitional moment of *ex pacto actio non oritur* to the gradual shifting recognizing consent as formative of agreements created first the need to justify the rule itself, not anymore as an *exceptio* that the defendant could raise but as guidance for merchant and ecclesiastical courts to apply as equitable[116].

A principle ever-expanding before the *ius gentium* would be the driving motor for the changing society, because either binding consent demonstrates an attitude against sins such as not conforming to promises. Under the advancing *lex mercatoria*, predictability was essential guidance for merchants' court decisions. Once the exceptions were incorporated in the new system, the attention was shifted to conciliating the deceiving features that words instead of formulas could provide.

The system evolved to establish situations where the pronounced vows were voided against real intent, composing the former system of *exceptio doli* to new into defenses detached from the *actio*. A bona fide purchaser finds protection on the Italian Civil Code on article 1153, constituting a title to acquire property conditioned to fulfilling some requisites in which good faith is usually required as the central aspect.

While modern systems accentuate the right to enable a claim of adverse possession, under Roman Law, the *exceptio doli* triggered defense mechanisms[117]. The *exceptio* denies the right and becomes a right on its own with time. Whether inspired by revolutionary and groundbreaking developments or emulated from other legal traditions, the Codes are an excellent source for studying the phenomenon of exception, how rules are created and disobeyed in the system.

In order to achieve this purpose, it is necessary to rely upon historical resources, scholarship over the topic, and apply comparative and devices to study the History of Law. The

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[116] Donahue, Charles. "Equity in the Courts of Merchants." *Tijdschrift voor Rechtsgeschiedenis/Revue d'Histoire du Droit/The Legal History Review*, vol. 72, no. 1-2, 2004, pp. 1-35.

[117] Costa, Emilio. *Exceptio Doli*, p.32.

tested hypothesis relies on deciding whether or not the suppression of consolidated concepts such as cause, good morals, and equity creates a perennial system's disbalance. In this sense, some tangential aspects must be tackled, differentiating cause in the continental legal tradition and consideration in the common law tradition to analyze different institutions that aim to solve disputes arising from misunderstandings of what the parties were engaging while they celebrated a contract. By investigating the cause more deeply, it is likely to find the roots of equity and theological concepts there.

This work will embrace the following organization:

Chapter I will be more concerned with a genealogical overview of the shifts from sacrifice to agreements. The discussed topics showcase the deep-seated correlation between debts, guilt, and the moral sphere, tying this understanding to the early formation of contracts and obligations. This chapter traces the evolution from violent assurance of repayment to the sophisticated, abstract legal system of obligations of the current moment. This complex evolution is marked by a move from physical assurance and harm to the more abstract legal consequences of broken promises and breaches of obligation.

Chapter II will embark on an analytical journey through the legal labyrinth of oaths and exceptions. It begins by adopting a quantum comparative lens to unpack the complex, intertwined fibers of law's temporal and spatial dimensions. The approach intends to scrutinize the systemic implications of these multifaceted legal constructs.

Another critical shift for the present study examines the interplay between the state and legal theory, particularly the state's role in diminishing the predominance of Will Theory or rectifying asymmetries. As the narrative unfolds, it brings forth an argument favoring the transformation of legal codification from broad, universalist principles to more precise, detailed regulations. Drawing inspiration from the philosophies of legal heavyweights like Carl Schmitt

and Giorgio Agamben, the chapter traces the roots of exceptions in public law, underlining their crucial role in shaping the legal landscape.

The study then turns its focus to the rising relevance of exceptions in legal discourse, the enforcement of nebulous agreements, and the challenges of navigating the turbulent seas of legal uncertainties. It culminates by probing the erosion of the traditional contract concept in a legal environment riddled with exceptions. The goal of this chapter is to offer a non-exhaustive understanding of the complexities and significance of oaths and exceptions within legal systems.

Chapter III engages with the multifaceted relationship between public and private Law and the application of exceptions and defenses in various legal systems. The chapter begins with a thorough analysis of the dynamic balance between the sanctity of contracts, encapsulated by the "pacta sunt servanda" principle, and the "rebus sic stantibus" clause, as the core values of fairness and adaptability. As those clauses are assessed in their authoritative forms, some preconceptions are questioned by examining how theoretical and practical divergences influence the application of Law. The chapter concludes by exploring the ripple effects of public Law on contract dissolution, particularly the impact of global events such as the war on contractual agreements and the experiences of case law breaches. It portrays how significant socio-political occurrences can shape and transform the landscape of contract law.

The conclusion will answer the following question: back to an *ius commune* or state's dissolution? Attempting still within the juridical order to solve the puzzle of coping with a pluralist global order emerging in which rights will be diminished to a condition of exceptions exercised by a few players.

I. Juridical Science Architectural Sophistication

I.I. The sacrificial features of agreements in general

> *"Like every good thing on earth, justice ends by suspending itself. The fine name this self-canceling justice has given itself is mercy. But mercy remains, as goes without saying, the prerogative of the strongest, his province beyond the law."*[118]

In the Genealogy of Morals, Nietzsche establishes a strong relation coming from the word *Schulden*, plural of *Schuld*, meaning debt, fault, and guilty. He stated the following:

> *"It was in this sphere then, the sphere of legal obligations, that the moral conceptual world of 'guilt,' 'conscience,' 'duty,' 'sacredness of duty' had its origin: its beginnings were, like the beginnings of everything great on earth, soaked in blood thoroughly and for a long time."*[119]

Human nature is distinct from the animal's capacity to retain memory, imprints of wills, and promises. To ensure a memory for those who promise, inspire trust, and guarantee repayment, corroborating the sanctity and seriousness of a promise[120], the memory must be recorded through bodily confirmations. Debtors pledged their promises by offering whatever valuable possession they owned, wives, freedom, and bodily parts, whereas the creditor could inflict any torture to secure repayment. However disproportionate those exchanges might seem,

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[118] Nietzsche, Friedrich. *The Birth of Tragedy and on the genealogy of morals [1872, 1887]*, translated by Francis Golffing. Doubleday Anchor Books, 1956. p. 205.

[119] Nietzsche, Friedrich. *On the genealogy of morals and ecce homo [1887, 1888]*, translated by Walter Kaufmann. Vintage Books, 1989. p. 65. See also Kelsen, Hans. *Essays in legal and moral Philosophy*. translated by Peter Heath. Reidel Publishing Company, 1973. p. 184: "[…] and when in Democritus himself, and elsewhere also in the ancient philosophy of nature, a cause is referred to as αἰτία, we should not forget that this word originally meant much the same as 'guilt'. Just as even nowadays in German '*etwas verschulden*' (to be guilty of something) is often equivalent to "*etwas verursachen*" (to cause something). The cause is "guilty of' (or "responsible for") the effect. That is the internal connection between the two elements of the causal law, and it has not yet wholly vanished from the scientific thinking of the modern age." Kelsen explains in a footnote to this passage that the word *αἰτία*, which first appears in the works of Pindar and Aeschylus, originally meant "*guilt*". However, Kelsen clarifies that in Herodotus' prologue to his history, the meaning of the word shifted to "cause." While in its earlier usage, the word had the exclusive meaning of "guilty," in its new context it meant exclusively "to accuse" or "to charge." The shift in meaning of the word αἰτία highlights the evolution of language and the nuances in the understanding of cause and guilt in ancient Greece. The development of attributing events to individuals changed the previously accepted idea of randomness of occurrences and gave rise to the concept of imputability, granting individuals the capability of causing events through their actions. This shift in thinking revolutionized the understanding of causality and the responsibilities of individuals in society.

[120] Ibid p. 64.

they are part of an increasingly calculating ability, that of retaining the transfer of physical goods secured by oaths in the abstract bundle of ideas.

In this regard, legal obligations constituted a sophisticated device allowing parties to free themselves from uncontrolled violence since promises allowed for acknowledging legal consequences arising from an obligation's breach[121]. The idea endeavored by Nietzsche in his third essay is the bloody cultivation of memory through sacrifices[122]. The encounter with the other presupposes measuring oneself against the other to evaluate what each party is worth to engage in negotiations, and to assess the otherness worthiness is to request what is available to seal the two minds' wills, harm follows broken pledges.

Nietzsche points out that the civil law relationship between creditor and debtor is preceded by the tribe's obligation to praise ancestors through sacrifices, fearing that not complying with such self-inflictions could lead the ancestral deities to revenge. Thus, Christ brought redemption by sacrificing himself for humanity's sins, and in Genesis, Abraham was asked for an absolute gift, his beloved son (Genesis, 22:2).

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[121] The Code of Hammurabi, translated by L. W. King, in The Avalon Project. Available at: https://avalon.law.yale.edu/ancient/hamframe.asp, accessed on October 6, 2022: "48. If any one owe a debt for a loan, and a storm prostrates the grain, or the harvest fail, or the grain does not grow for lack of water; in that year he need not give his creditor any grain, he washes his debt-tablet in water and pays no rent for this year." See also WIGMORE, John Henry. A Panorama of the World's Legal Systems: Vol. I. Saint Paul: West Publishing Company, 1928, pp. 73: "The King was the fountain of justice, receiving the law from divine guidance. But under King Hammurabi (about B.C. 2100) his deputized administration of justice passed from the hands of the royal secular judges, sitting commonly at the great gate and market-place of the city (as of yore also in Hebrew annals)." Therefore, implying that a process from sacred to secular adjudication occurred multiple time in World's History, not exclusively in Roman Law. Societal advancement brings the publicization of rituals and celebrations once confined to pontifical authorities.

[122] Derrida, Jacques. *The Gift of Death*, translated by David Wills. Univ. of Chicago Press, 1995. p. 111-112: "It is a matter of unfolding the mystagogical hypocrisy of a secret, putting on trial a fabricated mystery, a contract that has a secret clause, namely, that, seeing in secret, God will pay back infinitely more; a secret that we accept all the more easily since God remains the witness of every secret. He shares and he knows. We have to believe that he knows. This knowledge at the same time founds and destroys the Christian concepts of responsibility and justice and their 'object' The genealogy of responsibility that Nietzsche refers to in The Genealogy of Morals as 'the long history of the origin of responsibility (*Verantwortlichkeit*)' also describes the history of moral and religious conscience-a history of cruelty and sacrifice, of the holocaust even (these are Nietzsche's words), of fault as debt or obligation (*Schuld*, that 'cardinal idea,'that Hauptbegriff of morality), a history of the economy of 'the contractual relationship' between creditors (Gläubiger) and debtors (Schuldner). These relations appear as soon as there exist subjects under law in general (Rechtssubjekte), and they point back in turn 'to the primary forms of purchase, sale, barter, and trade'"

In a memorable passage condensing an entire sequence of contractual genealogy, Nietzsche envisions justice "*on this elementary level*" as "*the good will among parties of approximately equal power to come to terms with one another, to reach an 'understanding' by means of a settlement – and to compel parties of lesser power to reach a settlement among themselves*." [123] Therefore, what is considered as a universal principle of equity never achieves this character of absolute correspondence in the "enjoyment of violation" since the formation of exchanges presupposes subjective recognition of value[124].

In recollection, the Hammurabi Code contained a provision stating that if a disaster prevents a contractor from delivering a parcel's harvest, his debts shall be canceled, the provision stated: "*48. If any one owe a debt for a loan, and a storm prostrates the grain, or the harvest fail, or the grain does not grow for lack of water; in that year he need not give his creditor any grain, he washes his debt-tablet in water and pays no rent for this year*."

Those contractual stipulations released parties from suffering the burden of draconian clauses for non-performance[125]. As an illustration, a pact between wife and husband precluded the wife from becoming a creditor's hostage[126]. Parties' reliance on agreements depended on religious rituals and sacrificial operations to ensure obedience. Furlani refers to *pseudosacrifice* in Antiquity for the ritual slaughter of a goat to confirm promises on the occasion of the

[123] *On the Genealogy*, p. 70.

[124] De Sutter, Laurent. "Agreements." *A Cultural History of Law in the Early Modern Age*, edited by Peter Goodrich. Bloomsbury, 2019. p. 87.

[125] Pound, Roscoe. *An Introduction to the Philosophy of Law [1922]*. Yale University Press, 1955. p. 134: "In the result, abstract promises, as the civilian calls them, came to be enforced equally with those which came under some formal Roman category and with those having substantial presupposition. Modern continental law, apart from certain requirements of proof, resting on the same policy as our Statute of Frauds, asks only, Did the promisor intend to create a binding duty?" Procedures are also a manifestation of security and prevention of self-help, see Wigmore, John Henry. *A Panorama of the World's Legal Systems*, vol. I. West Publishing Company, 1928. p. 77: "The fullest extent record showing the normal course of proceedings in a lawsuit is one dating from about B.C. 2000, in the city of Babylon and the reign of Ammi-ditana; the plaintiff first apparently claims title to a piece of land; then the defendant sets up the execution of the deed; then the plaintiff rests on the allegation of non-payment of price: then the defendant joins issue on this allegation; and the court finds for the defendant, and requires the plaintiff to execute a release."

[126] Ibid.

celebration of a treaty[127], signaling the fatal consequences in case of the oath's breach[128]. The etymology of sacrifice is traceable from the Akkadian *niqū*, meaning libation, pouring out a liquid, an expression further transmitted to Aramaic and Hebrew[129], achieving a more intelligible meaning corresponding to Semitic rituals[130].

The immolation of the victim appeased the gods and ensured blessing for groups offering sacrifices. In Bataille's account, when discussions engage in the fundamental value of the word "useful," there is a tendency to flip the dialogue into a biased proposition[131].

However, Bataille advances the arguments by making a sharp distinction, very noticeable in life-occurring events. On one side, he assembles an individual's conservation through minimal and productive activities. On the other though, is where Bataille perceives the sovereign character of escaping from material constraints through unproductive expenditure,

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[127] Furlani, Giuseppe. *Il sacrificio nella religione dei semiti di Babilonia e Assiria*. Tip. G. Bardi, 1932. p. 272: *"I Sacrifici nelle clausole penali di contratti Assiri. Alcuni contratti del periodo neoassiro contengono per caso di inadempienza degli obblighi contrattuali sanzioni penali, tra le quali vi sono alcune che sembrano imporre alla parte che venisse meno all'obbligo assunto il sacrificio del proprio figlio o della propria figlia. L'interpretazione di queste clausole è molto incerta e, contrariamente a quanto è stato affermato da qualcuno, esse non sembrano affatto dimostrare che ancora nel periodo neoassiro si praticavano sacrifici umani in Mesopotamia*."

[128] Benveniste, Émile. « L'expression du serment dans la Grèce ancienne. » *Revue de l'histoire des religions*, 1947, pp. 81-94. Benveniste reconstructs the French *serment* offering as interpretation that an object was sacralized in the process of seizure. According to him: "*L'expression δρκον δμνύναι se laisse alors interpréter entiè rement. Ramenée à son sens premier, elle signifie : saisir fortement l'«objet-saeralisant ». C'est par le rite qui l'accom pagnait que l'acte de serment a été dénommé. Il comporte en effet le geste de saisir un objet qui devient le garant de l'engagement. Ce geste constitue le tout du δρκο."* By enlivening the expression "δρκον δμνύναι" to its original meaning of "object-oath" he traces the rite as from where the act of taking an oath was named. It involves the act of grasping an object that becomes the guarantee of the commitment. This gesture constitutes the whole of the "δρκον" (oath). On the *serment* See also Bollack, Jean. « Styx et serments. » *Revue des études grecques*, 1958, pp. 1-35. Boyancé, Pierre. "«Fides» et le serment." *Publications de l'École Française de Rome*, vol. 11, no. 1, 1972, pp. 91-103.

[129] Furlani, Giuseppe. *Il sacrificio nella religione dei semiti di Babilonia e Assiria*. Tip. G. Bardi, 1932. p. 323.

[130] Wigmore, John Henry. *A Panorama of the World's Legal Systems*, vol. I. West Publishing Company, 1928. p. 103: "But the contiguity of their territories linked their destinies in tribal struggles, for many centuries. Both in Egypt and in Babylon the Hebrew tribes sojourned for long period as a subject people. About B.C. 2100 the patriarch Abraham saw King Hammurabi, as an enemy in battle. Nearly a thousand years later the leader Moses, with his brother Aaron, appeared in the court of Pharaoh and it became serpent; this was the first miracle by which Moses hoped to soften Pharaoh's heart, and free the Hebrews from their bondage. And it was some six hundred years later that the great Hebrew judge Daniel, when captive in Babylonia, must often have looked upon the code-pillar of Hammurabi, which at that time still stood on the acropolis of Susa."

[131] Bataille, Georges. "The notion of expenditure." *Visions of Excess: selected writing 1927-1939*, translated by Allan Stoekl. University of Minnesota Press, 2017. p. 116.

such as wars, cults, luxury, and alike[132]. He illustrates that divide by taking other cultures' ways of solving this excess of tribulation through eliminating excesses. The display of excessive wealth creates social instability and must be dissuaded.

Bataille, relying on previous studies conducted by Marcel Mauss, proposes that in opposition to the classical economic description of primitive exchanges as barter, there is a more ambiguous exchange negotiation, not involving the notion of bargaining[133]. North American Indian tribes engage in a *potlach* celebration to solve scarcity issues and provide a social solution for an unacceptable display of prosperity[134].

The indiscriminate donation of gifts and riches ashamed the *donee*, who, in opposition, feels obliged to reciprocate previous festivals' extravagances to preserve its power and prestige[135]. In Rome 204 B.C., the *Lex Cincia* forbade gifts from family relations exceeding a certain amount to avoid bypassing testamentary positions. The general policy behind the prohibition raised as an *exceptio* and not voiding the donation[136] - was to accommodate a

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[132] Bataille, Georges. *La sovranità*, translated by Lino Gabellone. 2009, p. 14: "*L'al di là dell'utilità è il regno dela sovranità*."

[133] Lévi-Strauss, Claude. *La pensée Sauvage*. Plon, 1962. p. 17 : «*Or, cette exigence d'ordre est à la base de la pensée que nous appelons primitive, mais seulement pour autant qu'elle est à la base de toute pensée : car c'est sous l'angle des propriétés communes que nous accédons plus facilement aux formes de pensée qui nous semblent très étrangères*. »

[134] Bataille, Georges. *The notion of pure expenditure*, p. 121. Also referring to the potlach ceremony Farnsworth, E. Allan. "The past of promise: An historical introduction to contract." *Columbia Law Review*, vol. 69, no. 4, 1969, pp. 576-607 at 581. Every reconstruction of past modes of exchange delves into the complexities of the *potlatch* on how the destruction of excesses allows society to prosper in the way of better-distributing resources among members. The authors explain that loans in primitive societies did not fully encompass the idea of promises, as the obligation to repay a loan was not perceived to stem from the debtor's word. Instead, it was believed that the debt was recoverable because the debtor was in the custody of goods that still belonged to the creditor. In this view, a breach by the debtor was not a failure to fulfill a promise but rather an injustice with regards to property. He also mentioned a relevant point made by Frederick William Maitland, who spoke of a significant difference between "Give me what I own" and "Give me what I am owed." The passage is found in Maitland, F. W. *The forms of action at common law: a course of lectures*. Cambridge University Press, 1969. p. 38.

[135] Coudry, Marianne. « Lois somptuaires et comportement économique des élites de la Rome républicaine. » *Mélanges de l'École française de Rome-Antiquité*, 2016, p. 128.

[136] Buckland, W. W. *A Manual of Roman Private Law*, 2nd ed. Cambridge University Press, 1953. p. 397: "165. *Exceptio*. This was a defence which did not deny the *prima facie* claim but alleged some circumstances which excluded it. In form it was a product of the Edict, but the defence to which it gave effect was not necessarily praetorian. Sime *exceptiones* were based on leges, e.g. *l. Cinciae*, l. *Plaetoriae*; some of *senatus -consulta, e.g. sci. Macedoniani, Velleiania;* some imperial enactments, e.g. the exception under Hadrian's *beneficium divisionis*. But there were a great many *exceptiones* which were purely praetorian, e.g. *doli, metus, pacti conventi, rei venditae et traditae*, and so forth." See also Palermo, Antonio. Studi sulla "Exceptio" nel Diritto Classico. Dott. A. Giuffré Editore: Milano, 1956, p. 88: "*L'exceptio servì così ad introdurre nel campo del*

society growing in wealth, avoiding waste or borrowing loans to counterpoise others' immoderations[137]

As suggested by Casavola[138], in an extensive study dedicated to the *Lex Cincia*, the complete liberation of donations in an unequal society has the effect of widening the gap between the wealthiest and the rest of society. The restrictions regarding donations aimed to promote social cohesion and avoid the dissipation of wealth on unproductive grounds, not complying with a state policy favoring the *pater familia* constitution. *Lex Cincia*'s ban on unrestricted donations also signed a further advancement in Roman contractual relations, consolidating real property by establishing a special form for its transfer, ensuring the certainty of real property when confronted with contractual forms. It also increases state intervention in private matters, but with the ultimate goal of consolidating a more sophisticated society in which succession and transfer of wealth ensure stability.

Many centuries later, while jurists were involved in the draft of the Napolean Code, the same principles endured in the theories of Domat and Pothier[139]. By comparing societies in

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diritto sostanziale e processuale nuovi istituti e nuove regole di diritto attraverso la tendenza al rispetto dell'aequitas, di cui l'organo giurisdizionale si fece vivo interprete. Tendenza che non rappresenta soltanto um temperamento della legge nel caso singolo, imposto da ragioni di umanità e benignità, ma costituisce una esatta applicazione di norme giuridiche appartenenti a diversi sistemi, combinate nel caso di specie al fine di assicurare la soluzione giusta nel senso più moderno della parola. Ma accanto a questa funzione positiva la exceptio svolse anche una funzione negativa, intesa quest'ultima nel senso di difesa del convenuto (defendedorum eorum gratia cum quibus cum quibus agitur) che si concreta nel per exceptionem repelli nei confronti dell'attore."

[137] Stein, P. "Lex Cincia." *Athenaeum*, 19. See also Casavola, Franco. *Lex Cincia: Contributo alla Storia delle Origini della Donazione Romana*. Jovene, 1960. pp. 22-23.

[138] Casavola, Franco. *Lex Cincia: Contributo alla Storia delle Origini della Donazione Romana*. Jovene, 1960. pp. 22-23.

[139] Decock, Wim. *Theologians and Contract Law: The Moral Transformation of Ius Commune (ca. 1500-1650)*. Martinus Nijhoff publishers, 2013. pp. 80-81: "Like Pothier, the theologians recognized that moral debt (*debitum morale seu debitum ex honestate*) brought about a natural obligation, but not the kind of natural obligation which was enforceable in the court of conscience. The only enforceable natural obligation was the natural obligation rooted in the body of law called natural law (debitum ex iure naturali)." The same development also in Ascarelli, Tullio. *La Moneta: considerazioni di Diritto Privato*. Cedam, 1928. p. 158-159: "*Come è noto, mentre la dottrina tedesca – anche di fronte alla L. 4 agosto 1914 e all'ordinanza 28 settembre 1914 R.G. Bl. 417, relative ai soli contratti anteriori al 31 luglio 1914 – e quella americana sono concordi nel senso della liceità, in Italia ed in Francia dottrina e giurisprudenza sono divise: profondamente divise sino dai primi commentatori del codice Napoleone e si potrebbe dire sino dalla dottrina anteriore al medesimo perché l'illiceità della clausola d'oro, così corso come valore, si trova accennata già, e polemicamente, specie nei confronti delle trattazioni di Molineo, dal Pothier. (une monnaie est une sorte de drapeau national. Demogue*)." See also Todescan, Franco. *Le radici teologiche del giusnaturalismo laico: II,*

which gifts freely flow in search of donor's prestige, disregarding wealth needs of allocation, to a more rigid contractual and testamentary organization of society, it becomes explicit how the legal framing of institutions enables societal advancement. Instead of maintaining an underlying concern with the redistribution as a collateral effect of rituals and celebrations, the consolidation of modes embedded in juridical certainty promoted societal departure from superstition towards more predictable effects. Donor's possibility of raising *Lex Cincia*'s as an *exceptio* appeased the interference of affected parties on undisclosed prejudicial deals on behalf of unaccounted donees.

Since the new approach of Law and Economics takes utility as the paramount value for contractual burden distribution[140], it will become visible that this paradigm on risk allocation does not take into consideration either the roots of contractual obligations or the psyche of the human intellect, inclined to succumb to atavistic tendencies. As Anne Orford elucidates in her article on the role of sacrifices in international trade agreements, sacrifices for the Christian God are replaced by sacrifices to "the Market."[141]

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il problema della secolarizzazione nel pensiero giuridico di Jean Domat. Vol. 26 della collana per la storia del pensiero giuridico moderno. Giuffrè editore. p. 18: "La prefazione alle Loix civiles si ispira in definitiva a una duplice esigenza e tradisce la compresenza di due linee di pensiero: l'una matematistica, l'altra teologica. Se da un lato traduce l'aspirazione a uguagliare, nella giurisprudenza, il modello delle discipline scientifiche, d'altro lato – in sintonia con il metodo propugnato dall'*Augustinus* – si riafferma la necessità di ancorarsi saldamente all'autorità della tradizione. Per Domat il principio di autorità conserva importanza in un settore, come quello giuridico, che verte sullo studio delle norme divine e umane; tuttavia, solo in parte il giurista finisce per coincidere con la metodologia giansenista. La separazione fra filosofia e teologia, avanzata da Giansenio, non verrà condivisa fino in fondo dall'autore di Clermont, che tenderà piuttosto ad istaurare una vigorosa coniugazione tra premesse teologiche e metodo matematizzante."

[140] Windscheid, Bernardo. *Diritto delle Pandette vol. 4; note e riferimenti al Diritto Civile italiano iniziate dai professori Carlo Fadda e Paolo Emilio Bensa e continuate da Pietro Bonfante coadiuvato dall'avv. prof. Fulvio Maroi*. Rist. Stereotipa. Unione Tipografico-Editrice Torinese, 1930. p. 34: *"Se la materia del diritto è l'utilitas, il carattere eccezionale della norma che a questa s'inspira è impossibile. Il principio dell'utilità è principio normale, e viene svolgendosi con regole costanti nella vita del popolo. Il jus commune è per l'appunto ciò che risulta da questo svolgimento normale."*

[141] Orford, Anne. "Beyond harmonization: Trade, human rights and the economy of sacrifice." *Leiden Journal of International Law*, vol. 18, no. 2, 2005, pp. 179-213: "I want now to suggest that this form of law, with its secret relationship with mystery, can be understood through the Christian doctrine of sacrifice. Of particular relevance to the theological form of trade agreements is the need to hold universal principles, but also to betray those principles as part of the response to the sacrificial demand of the absolute other."

Under classical Roman Law[142], remnants of debtor loss of the right to be buried illustrate how theological categories' reception in Roman Law and its transfer to modern codification occurred[143].

Before currency evolved into the universal mean of exchange between parties[144], ensuring performance depended on several ritualistic proceedings[145]. Being the adjudicatory solution to disputes pontifical, the authority of the Law was not yet entrenched in society, and *legis actio* as a formula publicized to the parties appeared around 250 B.C[146]. Earlier, judicial decisions had an oracular character[147], forbidding the involved parties to assess the judicial process.

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[142] Zulueta, Francis de. *The Institutes of Gaius, Part II commentary*. Clarendon Press, 1953. p. 144: "Comparative law has shown that debtor-bondage is apt to develop into true obligation by way of self-guarantee; with due caution this result may be used in interpreting the scanty Roman evidence. The starting-point is that a man needing credit – it may be a loan, or time in which to find the ransom from some vengeance threatened on account of his wrongdoing – and not being able to obtain it on his mere promise, which would be unenforceable, gets a friend or kinsman to give himself as a bondsman to the creditor. The bondsman (nexus) will owe no debt; he will be simply a hostage. The debtor will not *nexus*, but to release the hostage by duly meeting the debt will be both his right against the creditor and his duty to the hostage. In describing this situation, it is convenient to use the Germanistic terms *Schuld* for the debtor's unenforceable duty to the creditor and *Haftung* for the engagement of the hostage but it must be borne in mind that while *obligatio* in its basic sense fairly corresponds to *Haftung*, there is no Latin equivalent for *Schuld*, and if no Latin term, no clear Roman concept."

[143] Astuti, Guido. p. 66: « […] Ulpiano contrapponeva le *nude conventiones* o *pactiones*, nude perché prive di forma e perché non concluse sulla base di una causa per cui una forma non fosse richiesta, ed enunciava il principio fondamentale della loro inidoneità radicale a generare un vincolo obbligatorio. Contro questa concezione tradizionale del *pactum* come convezione aformale in genere, è stato sostenuto che nel diritto romano classico il termine *pactum,* col verbo *pacisci*, avrebbe tipicamente indicato solo la convenzione consistente nella rinunzia, esplicita o implicita, all'esercizio di un diritto di azione attuale o potenziale, e avrebbe perciò avuto naturalmente come unico effetto una *exceptio* (Manenti). Senza dubbio le fonti documentano l'uso originario di *pacisci* in questa accezione più ristretta (si consideri l'analogo significato del più antico *pacere (pax)*, e il *ni cu meo pacit*, *talio esto* delle XII Tavole, che indica appunto l'accordo o composizione fra il reo e il leso per evitare il taglione (Tab. VIII, 2: cfr. Tab. I, 6-7): al pactum come accordo diretto ad eliminare una pretesa, e quindi a sciogliere un vincolo fra le parti (*pactum di non petendo*), si riferisce precisamente il *pacta conventa servabo* della clausola edittale, con cui il pretore accordava *l'exceptio pacti conventi*. Here Astuti draws the grounds for forming pacts to avoid revenge, placing as the immediate input for crafting the notion of *pacis* the idea of preventing the Twelve Tables' mandates of revenge, which approximates ancient Roman sources with Hammurabi and the alike.

[144] Ascarelli, Tullio. *La moneta: considerazioni di diritto privato*. Dott. A. Milani, 1928.

[145] Maine, Henry Sumner. *Dissertations on early law and custom*. J. Murray, 1883. p. 389: "So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms."

[146] Levy, Ernst. *West Roman Vulgar Law: The Law of Property*. American Philosophical Society, 1951. p. 240: "The disintegration of the system of *actiones* which took place in Roman vulgar law continued in the Visigothic and Burgundian codes down to a complete elimination. Even the miserable remnants which had hitherto survived, came now to disappear altogether.

[147] Dawson, John P. *The oracles of the law*. 1968, p. vi.

The magical and sacrificial aspects of agreements to Modern Law required several transfers from Semitic tradition through Roman Institutions to the schools of thought that absorbed those traditions into canonical forms[148], humanism[149], achieving its completion on modern codifications. The convertibility of contractual losses in damages in common Law underlies this discussion since personal coercion for the fulfillment of a promise bears those physical consequences deployed on former legal traditions[150]. The legal terms deployed on contractual taxonomies offer a genealogical and ethnographical path to contemporary doctrines still relying on a grammar founded on ancient roots[151]. While consideration stands for what one party provides to the other to achieve the meeting of minds or wills, the notion of excessive sacrifice upon one party claiming relief alludes to those theological ideas of what one is required to offer to establish a bond[152].

Furthermore, when a contractor finds an unconscionable clause and raises it as a defense, the idea is that the agreement does not conform with the principle of equity[153]. The solution for a controversy arising from unfair clauses depends on whether the party challenges the contract under the Common Law or civil law traditions. However, regardless of the tradition in which the controversy arises, the nature of defenses and the exceptions still borrow those mystical ritualized theological features received in Private Law through bargains and

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[148] Monateri, Pier Giuseppe. "Black Gaius: A quest for the multicultural origins of the Western legal tradition." *Hastings LJ*, vol. 51, 1999, p. 479. See also Tuori, Kaius. "The magic of mancipatio." *Revue internationale des droits de l'Antiquité*, vol. 50, 2008, pp. 499-521.

[149] Stein, Peter. *Roman Law in European History*. Cambridge University Press, 1999. p. 76: "humanism engendered a new critical attitude to the sources of law."

[150] Buckland, William Warwick. "The Nature of Contractual Obligation." *The Cambridge Law Journal*, vol. 8, no. 3, 1944, pp. 247-251.

[151] Magdelain, André. « Le ius archaïque. » *Mélanges de l'école française de Rome*, vol. 98, no. 1, 1986, pp. 265-358.

[152] Lorenzen, Ernest G. "Causa and Consideration in the Law of Contracts." *The Yale Law Journal*, vol. 28, no. 7, 1919, pp. 621-646.

[153] Schulz, Fritz. *History of Roman Legal Science*. Clarendon Press, 1953. p. 75: "But the problem raised for them as practising lawyers was always simply this: is it possible to meet the given case either by interpretation of the statute or by propounding an action or an exception? A negative *responsum* rendered further discussion useless, because the amendment of statutes is no part of a practising lawyer's business, while an affirmative responsum purported to lay down what was the law (*ius*), not to correct the law by equity (*aequitas*)."

agreements and in Public Law by the sovereign's assuming a political body complexion[154]. It is for no other reason than on Hobbes's frontispiece, Leviathan's body is depicted as an infinitude of souls, conveying the notion of the subject's sacrifice to avoid a state of civil war[155].

The same principle applies to agreements, restricted for certain strata of society to the modern idea of freed individuals exercising autonomy[156]. Underlying this notion, another one emerges, that the more wealth one party disposes of, the less concerned one will be with physical or sacrificial consequences following a breach. A demonstration of the earlier aspect is found in jurisdictions still allowing imprisonment for debts. In contrast, the sophisticated treaties on international sales apply a more adjudicatory approach for juridical persons in case of non-performance, in which parties enter to recover damages instead of suffering the personal consequences for the unfulfilled promise[157].

Those theological roots are situated at the core of juridical contractual institutions, converting the public-private distinction into a gradual variation allowing an understanding of

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[154] Stein, Peter. *Roman Law in European History*. Cambridge University Press, 1999. p. 21. Beale, Hugh G.; Bishop, William D.; Furmston, Michael Philip. *Contract: cases and materials*. Butterworths, 1995. pp. 659-660.

[155] Monateri, Pier Giuseppe. *Dominus Mundi: Political Sublime and the World Order*. Hart Publishing, 2018. p. 120.

[156] Horwitz, Morton J. "The historical foundations of modern contract law." *Harvard Law Review*, 1974, pp. 917-956. For an extensive explanation of the interplay of autonomy and the state see: Romano, Santi. *Frammenti di un dizionario giuridico*. Dott. A. Giuffrè Editore, 1983. p. 15. In "Frammenti di un dizionario giuridico," Santi Romano argues against the recent limitation of the concept of autonomy in legal systems. Some scholars have argued that autonomy can only be discussed in regard to original legal systems and from each system's perspective. This notion is based on two converging claims, the first being that a legal system derived from a higher power, such as the state, is not autonomous and is instead an integral part of the higher system. The second claim is that only original legal systems can be considered autonomous, as they are not subordinated to any other system and can only be considered autonomous by themselves. This idea is based on the principle of the exclusivity of each original legal system, a notion rooted in Kelsenian theories.

[157] Maitland, F. W. *The Forms of Actions at Common Law: A Course of Lectures [1936]*. Cambridge University Press, 1962. p. 68: "Assumpsit. The most curious offshoot of Case is Assumpsit and the great interest of this action lies in the fact that it becomes the general form by which contracts not under seal can be enforced by way of actions for damages. Under being the instrument under seal, the bond or covenant, and the 'real' contracts – the word 'real' being used in the sense of general jurisprudence – are protected by Debt-Detinue without it being seen that contract is the basis. Gradually however within the delictual action of Case various precedents collect in which the allegation is made that the defendant had undertaken to do something and then hurt the plaintiff either in his person or on his goods by doing it badly – by misfeance. Further an important element in this progress is the idea of breach of contract as being deceit – the plaintiff suffers detriment by relying on the promise of the defendant."

institutions' theological grounds[158]. The study of legal obligations reveals the origin of concepts like guilt, conscience, duty, and the sacredness of duty. From the tribal worship of ancestors through sacrifices to the modern application of damages in case of non-performance, the thread of obligation and its consequences can be traced throughout time. As one can attest by consulting ancient documents, such as legal diplomas and records, obligations were often sealed through pledges and sacrifices, such as offering valuable possessions, wives, or bodily parts. These sacrifices served as a means of confirming a promise and inspiring trust in the parties involved. As society evolved and legal systems developed, these sacrifices evolved into more abstract concepts, such as written contracts and the recording of debts.

This attempt concerns searching for the strand connecting contractual obligations and breaches from the past towards a moment of inconclusive distinctions in the fringes of frictions between public-private and substantive-procedural mechanisms, decouple them in their original state, investigate their patterns in historical contexts to henceforth interpret their purer forms invested with modern meanings. The evolution of legal obligations has resulted in the consolidation of laws and the entrenchment of the authority of the law in society, a process that was neither linear nor continuous.

I.II. Falsified experiences in the realm of Law: the beginning of differentiation

An exception is a remedy[159]. It was born as the negation of an instituted order, pretorial recognized since adjudicatory endorsement is the force allowing private juridical reality to

[158] Adams, William James. "Human sacrifice and the book of Abraham." *Brigham Young University Studies*, vol. 9, no. 4, 1969, pp. 473-480. Also Stein, Peter. *Roman Law in European History*. Cambridge University Press, 1999. p. 21: "In an elementary institutional work, Ulpian made for the first time a clear distinction between private law and public law. Hitherto the phrase 'public law' had no precise meaning and was often used to indicate those civil law rules which could not be altered by private agreement, by contrast with those that could be altered by the parties."

[159] Blackstone, William. *Commentaries on the Laws of England: In the Order, and Compiled from the Text of Blackstone: and Embracing the New Statutes and Alterations to the Present Time*. W. E. Dean, 1840. p. 82: "For it is a settled and invariable principle in the laws of England that every right, when withheld must have a

exist[160]. Agreements between parties on a consensual ground gradually replaced the inevitability of *legis actio's* outcome[161]. The realm of personal willpower over formulas ultimately led to the demise of the last. A highly regarded process that has a significant impact on shaping the understanding of Law as an objective set of rules, as defined by those who embrace positivism, but also allows for subjective relationships[162].

remedy and every injury its proper redress. The definition and explication of these numerous injuries and their respective legal remedies will employ our attention for many subsequent chapters."

[160] See for the development of autonomy and the role of legal orders in Cesarini Sforza, Widar. *Il diritto dei private*. Giuffrè, 1963. p. 25.

[161] Cappelletti, Mauro, James Gordley, and Earl Johnson Jr. *Towards Equal Justice: a comparative study of legal aid in modern societies*. Dott. A, Giuffrè editore, 1975. pp. 6-7: "The *legis actio*, the earliest Roman procedure to rise above primitive levels, seems to modern eyes almost designed to defeat justice rather to uphold it. By this procedure a case was brought before a magistrate through a series of ritual acts and declarations established by statute and by priestly lawyers who interpreted it. The parties themselves were not represented; as a result, these ceremonies were largely the secrets of patrician magistrates who used them as a barrier against the claims of the plebeian class. However, in about 259 B.C., a plebeian *pontifex maximus* succeeded in making these secrets public, thus destroying the value of this procedure as a class weapon and paving the way for the more rational *formula* procedure which superseded it." See also Costa, Emilio. *Storia del Diritto Romano Privato*, 3rd ed. G. Barbera Editore, 1921. p. 10: "*Dietro alle esigenze della vita, avvertite via via dalla comune coscienza giuridica, ciascun Pretore, come interprete ed organo di questa, poneva in atto nel suo editto ricognizioni di istituti e rapporti non peranco contemplati e protetti dalle norme dei mores e delle leges, o deroghe e distacchi da norme fissate da queste. Le poneva in atto indirettamente, per mezzo di strumenti processuali, ch'egli dichiarava nel suo editto di concedere a tutela di quelli: strumenti che potevano consistere in azioni idonee a farla valere (actio nem dabo, iudicium dabo), o in garanzie atte ad assicurarne l'adempimento (satisdationes),o in altri provvedimenti cautelari (missiones in possessionem), o in provvisori divieti (interdicta), o da difese opponibile ad azione fondate sopra norme di leggi non più rispondenti alle condizioni vive e presenti (exceptiones).*" In this passage, Costa discuss the role of the Pretor in the Roman legal system. The Pretor was seen as an interpreter and agent of the common legal consciousness and was responsible for putting into practice, through his edict, recognitions of institutions and relationships that were not yet protected by the norms of the mores and leges, or deviations and departures from norms established by these laws. He did this indirectly through procedural tools that he declared in his edict to protect these institutions, such as actions to enforce them (*actio nem dabo, iudicium dabo)*, guarantees to ensure their fulfillment (*satisdationes*), other precautionary measures (*missiones in possessionem*), temporary prohibitions (*interdicta*), or defenses that could be opposed to actions based on laws no longer applicable to current conditions (*exceptiones*).

[162] Benjamin, Walter. "Il dramma Barocco Tedesco." Opere Complete, II. Scritti 1923-1927, edited by Enrico Ganni. Einaudi, pp. 69-268. p. 105: "Dal ricco sentimento vitale proprio del Rinascimento se emancipa il suo elemento dispotico-mondano, per sviluppare fino alla restaurazione insieme ecclesiastica e statale. Una di queste conseguenze è l'esigenza di un principato il cui status giuridico-politico garantisca la continuità di quella vita associata che fiorisce attraverso le armi e le scienze, le arti e il clero. La mentalità giuridico-teologica che contraddistingue l'intero secolo esprime quella tensione irrisolta verso la trascendenza che sta alla base del Barocco storico della Restaurazione si contrappone frontalmente, nel Barocco, l'idea di catastrofe. E proprio su questa antitesi viene coniata la teoria dello stato d'eccezione. Così, se si vuole spiegare come mai 'la viva coscienza del significato del caso eccezionale, che domina il giusnaturalismo del XVII secolo', vada in seguito perduta, non sarà sufficiente chiamare in causa la maggiore stabilità politica del secolo successivo. Se infatti, 'per Kant…il diritto d'eccezione non è più affatto un diritto', ciò dipende dal suo razionalismo teologico."

In Roman law, the concept of exceptions was an important principle that allowed individuals to defend themselves against the enforcement of a legal claim[163]. The exceptions were essentially grounds for an individual to argue that the claimant's demands were not legally valid and that the defendant should not be held liable. This concept was a crucial aspect of the regulation of private law in ancient Rome, as it allowed individuals to challenge the application of the law in specific circumstances and to assert their rights.

The exceptions in Roman law were typically divided into two categories: "exceptions in fact," which were based on the specific circumstances of the case, and "exceptions in law," which were based on broader legal principles. Examples of exceptions in fact include the defense of ignorance or mistake, while examples of exceptions in law include the defense of prescription – the right to a thing acquired through long and uninterrupted possession – or the defense of unenforceability – the claim is unenforceable because it is against public policy[164].

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[163] For a more detailed explanation on the institution Costa, Emilio. *L'exceptio doli*. L'erma di Bretschneider, 1970 (ed. Bologna 1897). See p. 286-288: "*Può tuttora codesto magistero che descrivemmo dell'exceptio doli, proseguirsi così, quale fu in Roma, nei moderni diritti praticamente? La questione è stata dibattuta in Germania, in relazione con l'altra più ampia intorno all'applicabilità odierna del concetto romano di eccezione. La risposta negativa a quella come a questa, tende però anche in Germania a prevalere. E sembra, a noi pure, giustamente; dacché manchi oggidì l'organo essenziale da cui l'eccezione vera emana: il pretore; né potendo per alcun modo l'odierno magistrato allontanarsi, nel riconoscere un rapporto del convenuto che contrasti al diritto dell'azione, dalla tassativa disposizione della legge, nè pero, fuor di questa e di propria autorità, prestare accoglimento a nuovi bisogni affermantisi nella vita, e richiedenti la trasformazione degli istituti che la legge disciplina, o la configurazione di nuovi; salvo altrimenti incorrere nel pericolo di quell'aequitas cerebrina, [...] Mutato è lo strumento, con che la coscienza giuridica avverte i nuovi bisogni: ben altri elementi influiscono a creare e ad evolvere questi di continuo. Ma l'esempio del modo con che Roma seppe provvedere a comporre conflitti via via avanzantisi, con un'exceptio data dalla mala fede in chi agisce, può porgere, a chi ben li intenda, datti tuttora preziosi a comporre i nuovi conflitti, coi mezzi che i mutati strumenti della coscienza giuridica e i diversi bisogni consentano.*" In his final remarks, the author develops an appealing reasoning regarding the usefulness of excpetio doli in the solution of current controversies. He believes in the inapplicability of the institute as used in Rome due to the inexistence of the praetorial figure to supplant the authority of the legal command in the current legal systems. However, his understanding is for the applicability of the institute's logic to resolve conflicts involving good faith between contracting parties.

[164] Stein, Peter. *Roman Law in European History*. Cambridge University Press, 1999. p. 82: "An influential example of the application of Ramist method to law in the *Dicaelogicae lib. III* of the German scholar Johannes Althusius which apperead in 1617. The sub-title indicates its aim: 'The whole law in force, methodically set out, with parallels from Jewish law, and supplemented by tables'. Althusius first distinguishes between law and facts, by which he means the transactions between persons which have effects in the law. Building on Connanus's idea that in the institutional scheme actions should be understood as covering not just legal proceedings but all human acts. Althusius developed the notion of *negotium*."

In essence, the concept of exceptions in Roman law provided a mechanism for individuals to defend their rights and interests against the enforcement of legal claims. This principle continues to be an important part of modern legal systems, particularly in the regulation of private law, where individuals can assert their rights and challenge the application of the law in specific circumstances.

Gierke's warns stand accurate to this day. Contracts are not a mere relationship among individuals since "u*nrestricted freedom of contract destroys itself. A fearsome weapon in the fist of the strong, a blunted tool in the clutch of the weak, it becomes the means of oppression of one by another, the merciless exploitation of intellectual and economic power."*[165]. Although Gierke was precise in his criticism, it is worth noting how abstraction allowed contracts to evolve, even though sometimes disguising parties on caveats and concealing the subject matter transacted[166]. If some contracts from the very beginning imply the meetings of minds regarding their objects, less approved dealings, such as usurious loans, demand many layers of deception for societal and, therefore, juridical approval.

The reason for drawing connections between Roman law and modern legal systems in the 21st century is two-fold. Firstly, the vast amount of sources produced by the Romans documenting their daily affairs provides a rich source of information and insight into the development of legal concepts and principles. Secondly, invoking the authority of Roman law serves as a means of drawing on the prestige and respect associated with the Roman Empire, particularly in the competition for dominance and respect among legal systems.

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[165] Von Gierke, Otto. "The Social Role of Private Law," translated by Ewan McGaughy. *German LJ*, vol. 19, 2018, p. 1017.

[166] Gierke, Otto. *Natural Law and the Theory of Society 1500 to 1800*, translated with an introduction by Ernest Barker. Vol I. Cambridge University Press, 1934. p. 46: "If the conception of a social contract was pushed to its logical conclusion, any right belonging to a community was necessarily reduced to the collective rights of a number of individuals; and the internal nexus of the popular community became nothing more than a network of contractual relationships between its various members. In the writings of Althusius we already find the idea of mere 'social' connection [or in other words, the idea if simple 'partnership'] extended to the whole of the State, and this in spite of the fact that he lays more emphasis than any other writer upon its corporate character."

The creation of states and the regulation of violence at multiple levels highlights the critical role law plays in resolving societal conflicts. The pursuit of order in law operates similarly to it in myths, as both strive to establish order and regulate behavior. With its prestige as an archetype narrative, Roman law was utilized as a legal tool in developing the European legal tradition. Still, its transplantation also led to the 21st-century legal culture that seeks to transcend these schemes without relying on a consistent parallel myth[167].

Present-day lawfare[168], as the use of legal systems and instruments to achieve strategic objectives in conflict or competition, has become a tool in hybrid wars and the export of legal models[169]. Contractual relationships, such as the division between *ius civilis* and *ius genitum*, have served similar purposes, but scholarly work still needs to recognize that *jus gentium* presupposes foreignness.

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[167] See Monateri, Pier Giuseppe. "The weak law: contaminations and legal cultures." *Transnat'l L. & Contemp. Probs.*, vol. 13, 2003, p. 575. And also MONATERI, Pier Giuseppe, et al. *La invención del derecho privado*. Siglo del Hombre Editores, 2006.

[168] Comaroff, John L. "Colonialism, culture, and the law: A foreword." *Law & Social Inquiry*, vol. 26, no. 2, 2001, pp. 305-314. p. 306: "That "mode of warfare" - or rather lawfare, the effort to conquer and control indigenous peoples by the coercive use of legal means-had many theaters, many dramatis personae, many scripts. Most commonly noted among them was the creation of so-called customary law, a particular sub- species of the genus of historical practice that has come to be known, after Hobsbawm and Ranger (1983), as "the invention of tradition." The colonial rationale, went the argument, was straightforward enough: To the degree that non-Western cultures were mired in what Max Gluckman was fond of calling "the kingdom of custom" (Comaroff 1995), they obviously lacked a corpus juris, a modem sense of right-bearing selfhood (cf. Taylor 1989), and most seriously of all, anything approaching "civilized'' judicial procedures. It was appropriate, therefore, that in the name of universal "progress," they be subordinated to a superior European legal order. As a result, vernacular dispute-settlement institutions, their jurisdictions and mandates severely restricted, were everywhere formally, sometimes forcibly, incorporated into the colonial state at the lowest levels of its hierarchy of courts and tribunals; furthermore, local cultural practices deemed." Dezalay, Yves; Garth, Bryant G. *The internationalization of palace wars. Lawyer, Economists, and the Contest to Transform Latin American States*. Universidad de Chicago, 2002. p. 250: "The new ambition of the cosmopolitan elite-the rule of law-is from this perspective also bound to be a limited success at best. The ambition to build this rule of law, moreover, is not so clear and unequivocal throughout the cosmopolitan elites. The devalorization or disqualification of local justice and local states in Latin America (and elsewhere) because of their embeddedness in patronage and clientelism also provides legitimacy and prestige for those at the top of the two-tiered system. They gain recognition, in part, for the sophistication of their criticisms. Their distance and their cosmopolitan connections and credibility, in other words, allow them to appear as a nobility speaking on behalf of the new and sophisticated remedies for the state and the economy."

[169] Frustration in the event of war will be analyzed at length in the following chapter, see McNair, Lord Arnold Duncan. *The Legal effects of war*. Cambridge Univ. Press, 1966. p. 156.

As evidenced by the work of scholars such as Koschaker and Rene Cassin[170], the influence of Roman law can be seen in the blending of Roman and Germanic forms of agreement, such as *mancipatio*, *stipulatio*, and *nexum* with forms and rituals developed in Germanic law, such as fides facta. This evolution of forms allowed for exceptions in the formation of wills, allowing parties to circumvent the force of a promise in situations foreseen by the law.

The following passages will be centered on understanding how the metaphysical leap enabled a manifestation of wills liberated from rigid rituals and beliefs[171], deploying the historical sources as evidence of this contractual passage[172]. Through the examination of

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[170] Koschaker, Paul. "L'Europa e il Diritto Romano," translated by Arnaldo Biscardi. *Das Europa und das römische Recht [1958]*. Sansoni, 1962. p. 419. As stated in Koschaker, providing an example, Charlemagne's awe of the Christian faith also reckoned a unifying aspiration achieved by the Roman Empire. Fundamental structural relations and forms of agreements, such as *mancipatio, stipulatio*, *and nexum,* found an appropriate blending with forms and rituals developed in Germanic forms, such as *fides facta. See also* Cassin, Rene. *De l'exception tirée de l'inexécution dans les rapports synallagmatiques (exception non adimpleti contractus) et de ses relations avec le droit de rétention, la compensation et la résolution*, p. 6-7 : « Pour nous, nous estimons que les Romains ont eu une conscience très nett de la nécessité de faire une situation égale aux deux parties en présence, et d'assurer efficacement le respect de la bonne foi. C'est pourquoi des textes assez nombreux nous font assister au rejet des prétentions du contractant qui réclame la prestation de l'autre sans fournir la sienne. Mais jamais il n'y a eu à Rome une organisation juridique bien ferme du refus d'exécution : la théorie de ce que l'on appelle *l'exc. N. a. contractus* n'a jamais été faite par les jurisconsultes romains, et d'ailleurs le refus d'exécution, lorsqu'il a été reconnu, a toujours eu des caractères distincts de ceux qu'on lui reconnaît de nos jours, à raison des particularités de la procédure romaine. And also Esmein, Adhemar. « Études sur les contrats dans le très ancien droit français. » *Nouvelle revue historique de droit français et étranger*, vol. 6, 1882, pp. 35-75.

[171] Holmes, Oliver Wendell Jr. *The Common Law*. Dover Publications, 1991. p. 253: "Our law does not enforce every promise which a man may make. Promises made as ninety-nine promises out of a hundred are, by word of mouth or simple writing, are not binding unless there is a consideration for them." p. 251: "Since the time of Savigny, the first appearance of contract both in Roman Law and German law has often been attributed to the case of a sale by some accident remaining incomplete. The question does not seem to be of great philosophical significance. For to explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever to frame a future tense." These two passages illustrate how Holmes was versed in deeper philosophical inquiries, since he was part of a club with prominent figures of Massachusetts such as William James, the father of pragmatism and psychology, John Dewey, and Charles Pierce. The fundamental essence of promises raises questions regarding the evolution of humanity's understanding of future projections, which, while not necessarily within the purview of law, nonetheless has a direct impact on it. See also Menand, Louis. *The metaphysical club: A story of ideas in America*. Macmillan, 2002.

[172] Supiot, Alain. *Homo Juridicus : Essai sur la fonction anthropologique du Droit*. Éditions du Seuil, 2005. p. 152-153 : "Les glossateurs médiévaux ont repris à leur compte l'adage *Ex nudo pacto actio non nascitur*, et édifié sur lui leur théorie des *vestimenta pactorum*. Puisque, selon la formule d'Accurse, le pacte nu est comme une femme sterile, il s'agit de le bien vêtir pour qu'il enfante des droits. Certains pactes <<sont gras et chauds de nature et um rien suffit à les habiller>>, comme la vente ou le louage, où le Droit roman voyait déjà des contrats consensuels. Pour les autres, il faut des vêtements moins légers que le simple *consensus* : la *res*, les verba, la *cahaerentia*, la *rei interventus*… C'est de cette théorie des *vestimenta* que Loysel se gaussera au XVI siècle, lorsqu'après avoir donné au consensualisme sa plus célèbre image – <<On lie les bœufs par les cornes et les hommes par les paroles>> -- il ajoute : <<et autant vaut une simple promesse ou convenance que les

historical sources, this chapter will demonstrate the gradual process of detachment from the sin and the notion of an offense, marked by a constant need for validating causes for creating a transferable obligation that was not dependent on an unlawful root.

The evolution of those forms allowed for the exception on the consensual formation of wills to become the benchmark allowing the parties to circumvent the force of a promise in situations foreseen by the law. As previously indicated, the bond that connected the figure of the offender and the offended allowed an abstract nexus to arise, a relationship that, once abstracted, could be transferred, or relinquished, making it a transaction independent from its origin. The process of detachment from the sin and the notion of an offense, although gradual, was marked by a constant need for validating causes for creating a transferable obligation not dependent on an unlawful root.

Without its primordial sacrificial reminiscents, liability, property, and obligations are impossible to be explained. Once indistinguishable, categories came to be defined separately, making it possible for an obligation to circulate without defined parties or property to be a relation between the holder and a thing without the interference of others, except for the State as the grantor of abstract's category existence[173]. Conceded that the explanation of barter as the source for contractual exchange based on currency is debated to these days, the same works for property as an instrument do publicize violence.

By examining the creation of states, such as the case of Israel as a model, it becomes clear that law regulates violence at multiple levels. This includes not only the violence exercised by the strong or the elites, as depicted by grand theories of superstructure, but also the small acts of violence necessary to bring individuals into collective gatherings.

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stipulations du Droit romain>>. C'est qu'entre les glossateurs et Loysel, le principe s'est proprement inversé et que l'on admet désormais, à rebours du Droit romain, *qu'ex nudo pacto, actio oritur* (du pacte nu naît un droit d'agir en justice)."

[173] Tuori, K. *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient*. Klostermann, 2007. p. 24 ss.

René Girard[174], in addressing the concept of mimetic violence, which involves a triangular relationship established by individuals imitating the aspirations or desired expectations of others, found at its core the explanation for society's need for a scapegoat figure. In situations of scarcity, lack of resources, or other events leading to deprivation, the solution becomes blaming a sacrificial individual as a means of pacifying the group. This highlights the important role that law plays in regulating violence and resolving conflicts within society[175].

The development of the Roman *sacer esto,* and similar representations of sacred subjects in different societies propitiates the separation between the punishiable agent and the sin commited, releasing unexpected resources on this group[176]. Zulletta, on his commentaries of Gaius Institutiones, while adopting comparative Law materials for drawing a paralel between German Law and Roman Law refering to *Schuld* and *Haftung* bifurcation[177], finds the

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[174] Girard, Rene. *The scapegoat [1982]*, translated by Yvonne Freccero. The John Hopkins University Press, 1986. p. 25. See also on the origins of the Roman *Sacer esto* Garofalo. *Appunti sul diritto criminale nella Roma monarchica e repubblicana*. CLEUP, 1992. p. 32.

[175] Girard, Rene. *Violence and the Sacred [1972]*, translated by Patrick Gregory. The John Hopkins University Press, 1989. p. 45: "Tragedy is the balancing of the scale, not of justice but of violence. No sooner is something added to one side of the scale than its equivalent is contributed to the other. The same insults and accusations fly from one combatant to the other, as a ball flies from one player to another in tennis. The conflict stretches on interminably because between the two adversaries there is no difference whatsoever." Girard's ideas connect to the idea of transition from an archaic theocracy to a new, "modern" order based on statism and laws in ancient Greece. Historians suggest that Greek tragedy was part of this transition, with the decline of the archaic order being marked by the decline of its religious element, or the sacrificial rites. The stability of the archaic order must have relied on these religious practices, which helped to regulate violence and maintain social order. As societies evolved and transitioned towards more modern forms of governance based on laws and statism, the role of sacrifice and religious rituals in regulating violence and resolving conflicts diminished. In its place, new institutions and legal structures were developed, such as contracts, which served similar purposes. Contracts, like sacrifices, provide a means of regulating relationships and resolving conflicts, but they do so through a legal framework rather than a religious one.

[176] Mitos de criação 130 e sacrifícios que se seguem a tais eventos. Hubert, Henri ; Mauss, Marcel. *Essai sur la Nature et la fonction du Sacrifice*. Extrait de l'Année Sociologique, Deuxieme anée 1897-1898. Ancienne Librairie Germer Saint-German 108, 1899. p. 130 : « Aussi la théologie emprunta-t-elle ses cosmogonies aux mythes sacrificiels. Elle explique la création, comme l'imagination populaire expliquait la vie annuelle de la nature, par un sacrifice. Pour cela, elle reporta le sacrifice de dieu à l'origine du monde. »

[177] Zulueta, Francis de. *The Institutes of Gaius, Part II commentary*. Clarendon Press, 1953. p. 144: "Comparative law has shown that debtor-bondage is apt to develop into true obligation by way of self-guarantee; with due caution this result may be used in interpreting the scanty Roman evidence. The starting-point is that a man needing credit – it may be a loan, or time in which to find the ransom from some vengeance threatened on account of his wrongdoing – and not being able to obtain it on his mere promise, which would be unenforceable, gets a friend or kinsman to give himself as a bondsman to the creditor. The bondsman (nexus) will owe no debt; he will be simply a hostage. The debtor will not *nexus*, but to release the hostage by duly meeting the debt will be both his right against the creditor and his duty to the hostage. In describing this situation, it is convenient to use the Germanistic terms *Schuld* for the debtor's unenforceable duty to the creditor and *Haftung* for the engagement of the hostage but it must be borne in mind that while *obligatio* in its

same patern repeated in *mancipii causa* since a rule in the Twelve Tables limited the number a father could exercise the potestas of placing his son in bondage status[178]. Again, the same phenomena was described by David Graeber in African tribes where the exchange of sisters, know as peonage functioned in the same way[179].

Sacrality is a pattern recurrent across cultures since human experience reproduces similar abstractions[180].

The pursuit of order in law operates in a similar manner as it does in myths[181]. The drive to establish order is the driving force behind the creation of origin myths, while myths about heroes emerge to regulate behavior and expectations by emulating human passions.

Roman law, which was transported and transplanted over centuries, was utilized as a legal tool in the development of the European legal tradition due to its prestige as an archetype narrative[182]. This can be compared to modern day clashes among traditions and how they are used to assert cultural dominance. The adversarial method in common law illustrates how a seemingly harmless legal device in some jurisdictions can become an instrument of ruling and

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basic sense fairly corresponds to *Haftung*, there is no Latin equivalent for *Schuld*, and if no Latin term, no clear Roman concept."

178 Zulueta, Francis de. *The Institutes of Gaius, Part II commentary*. Clarendon Press, 1953. p. 143.

179 Graeber, David. *Debt, The First 5,000 Years*. Melville, 2011. p. 368.

180 Magdelain, André. *Jus Imperium Auctoritas : Études de Droit Roman*. École Française de Rome : Palais Farnése, 1990. p. XII : « Le droit civil a reçu du *ius sacrum* un autre héritage. Un des traits de celui-ci est un automatisme qui si produit en certaines circonstances. La violation d'un tabou le coupable par un enchaînement immédiat, et ceci est la marque du *sacer esto*. Cet automatisme est comparable à celui qui anime l'efficacité de plein droit des formules rituelles. Cette idée est passée en droit civil où elle connait un large développement. Là aussi l'acte juridique produit aussitôt son effet en vertu du formalisme. Même en l'absence de filiation sacrale, prévaut le principe que les institutions civiles ont un fonctionnement qui sauf procès se passe du concours du magistrat. » L'acte juridique au cours de l'ancien droit Romain, p. 714 : « Le cours de l'ancien droit n'est pas resté invariable, et c'est une erreur de croire que la *sponsio*, la *stipulatio*, le *nexum*, et la mancipation ont toujours entretenu les relations qu'on observe dans le dernier état de leur évolution avant l'ère préclassique. C'est par commodité et dans un esprit de simplification que l'on adopte habituellement cette façon de voir. Mais l'agencement réciproque de ces diverses institutions à l'époque archaïque disjoint la *stipulati*o de la *sponsio* et raproche le nexum de la mancipation, comme cela se manifeste dans l'expression décemvirale *nexum mancipiumque*. Il faut compter avec un temps où l'acte juridique sous ses différentes formes donnait lieu à des combinaisons propres à une autre société et une autre économie. »

181 Smith, Jonathan Z. *Map is not Territory: study in the History of Religions*. Brill, 1978. p. 308: "I have suggested that myth is best conceived not as a primordium, but rather as a limited collection of elements with a fixed range of cultural meanings, which are applied, thought with, worked with, experimented with in particular situations."

182 Koschaker, *L'Europa e il Diritto Romano*, p. 142.

control through soft mechanisms. In reality, an illusion is created portraying a neutral system of adjudication based on cooperation and participation to circulate the model better. But examining the phenomena more, it becomes visible how flawed the system operates in the original jurisdiction, and with even more reason, how it will impair some subjects instead of others.[183]

Contractual relationships that divided *ius civili*s and *ius genitum* served similar purposes, and even though Grotius and Pufendorf later moved toward *ius gentium* to establish a theory of contractual consent, scholarly work failed to recognize that jus gentium presupposed foreignness[184].

The mythological narrative in which Roman law was shaped by transplanting gods and myths has led to the 21st-century legal culture that seeks to transcend these schemes without relying on a consistent parallel myth.[185]

In the continental legal tradition, mental frameworks play a significant role in providing coherence to the legal system and explaining the categories of torts[186], contracts, and

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[183] Brown, Darryl K. *Free market criminal justice: How democracy and laissez faire undermine the rule of law*. Oxford University Press, 2016. See also Grande, Elisabetta. *Imitazione e diritto: ipotesi sulla circolazione dei modelli*. Giappichelli, 2000.

[184] Relevant to quote some of Legendre's passages in Legendre, Pierre. *L' amour du censeur : essai sur l'ordre dogmatique.* Éd. du Seuil, 1974. p. 115 : "la chose jugée tient la place de la vérité: res judicata pro veritate habetur" Regarding logic and myth. p. 133: "on oublie aujourd'hui, par exemple, l'efficacitè de la doctrine du péché pour asseoir un concept aussi prodigieux." In a footnote of the quotation he adds: "Le contrat, dont la force obligatoire a été définie à partir d'une doctrine répressive du manquement à la parole, est une idée-clé de l'organisation occidentale ; elle soutient tout le Droit commercial de l'économie dite libérale et même, pour une bonne part, le Droit international dont le néerlandais Grotius fut au XVII siècle le théoricien prestigieux." The author explores the relationship between logic and myth in the development of legal systems. Legendre notes that the concept of res judicata, which holds that a judgment is considered the truth, has played a crucial role in shaping Western legal systems, also arguing that the idea of the contract, with its obligations defined through a repressive doctrine of breach of promise, is a critical concept in Western legal organization and underpins much of the commercial law in liberal economies and even international law, with the Dutch scholar Grotius being a highly regarded theorist in the 17th century. However, Legendre also observes that the historical significance of the doctrine of sin in establishing this concept is often forgotten. He argues that the contract, as a central idea in Western legal organization, has its roots in a repressive doctrine of breach of promise and that this relationship is often overlooked in contemporary discussions of legal systems. By drawing attention to the origins and evolution of the contract as a legal concept, Legendre sheds light on the complex interplay between logic and myth in the development of legal systems.

[185] For juridical myths see Romano, Santi, *Frammenti di um Dizionario Giuridico, stampa inalterarata*. Giuffre, 1983. *Mitologia giuridica*; miti, pp. 126.

[186] Differently from what Gilmore argues to defend the death of contract, ancient sources of primitive law indicates that contracts originated from torts and not the opposite, see Gilmore, Grant. *The Death of Contract*.

determining whether a party is seeking relief or performance. These frameworks are rooted in entrenched categories that date back to the Pretorian constructions mentioned in the introduction[187]. The reliance on these mental schemes highlights the importance of historical continuity and the development of legal concepts over time in the continental legal tradition[188]. Equity, remedies, *ius civile* and *ius gentium*, *ius honoraris,* and *actio legis* are part of the same primordial construction, the need for adjusting universal rules and facts according to different subjects and situations. Regardless of how those laws are framed or by whom they will be enacted and enforced, the one fits all standard is impossible to achieve. Every Law comes with its antidote or exception for its infeasibility to fulfill an overall conformation[189].

Even though the exception's legal taxonomy is limited to procedural defenses and institutions, such as the exception for contractual breaches and remedies, the range of its ontological meaning encompasses all rules concerned with accommodation between abstract constructions and the effects on actual circumstances[190].

Ohio State Univ. Press, 1974. p. 94: "Let us assume, arguendo, that is the fate of *contracto* to be swallowed up by tort (or for both of them to be swallowed up in generalized theory of civil obligation). We must still provide ourselves with an explanation of what contract – the classical or general theory of contract, as we have called it – was about in the first place and, if it is now dead or dying, what caused the fatal disease."

187 Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Traditions*. Oxford University Press, 1990. p. 6: "since Roman Law was an actional law, it mattered little whether an agreement was to be regarded as binding if no suitable procedural formula was available to enforce it."

188 Mazzarella, Giuseppe. *Le unità elementar dei sistemi giuridici*. Casa Editrice G. Principato, 1922. p. 9: "*L'etnologia giuridica è la scienza, che, mediante lo studio analítico e comparativo dele istituzioni e dele idee giuridiche di tutti i popoli accessibili all'indagine scientifica, si propor di determinare indutivamente il processo generale dello sviluppo strutturale e psicologico del diritto, le cause del processo medesimo, e le leggi secondo le quali esse operano*." The author derives his thoughts on Lévi-Strauss argument that all societies have a set of basic rules and principles governing the relationships between individuals who are related by blood or marriage. These rules and principles, which he referred to as the "elementary structures of kinship," are universal and can be found in all cultures, regardless of their level of technological or social development. According to Lévi-Strauss, these structures are based on a series of binary oppositions, such as "male/female," "nature/culture," and "self/other." These oppositions are used to categorize and understand relationships between individuals, and to determine the rights, duties, and obligations of each person within the kinship system. The elementary structures of kinship also serve as the foundation for the creation of more complex kinship systems and social institutions, such as the family, marriage, and inheritance. Lévi-Strauss believed that these structures are not arbitrary or culturally specific, but are instead the result of universal human needs and desires. See note 74.

189 Abriani, Niccolò; Caselli, Gian Carlo; Celotto, Alfonso; Marzio, Fabrizio Di; Masini, Stefano. Tremonti, Giulio. *Il Diritto e l'eccezione: stress economico in tempi di emergenza*. Donzelli editore, 2020. p. 3: "Stiamo entrando in una terra dove è già ora difficile, ma sarà sempre più difficile definire il confine tra prima e dopo, tra vecchio e nuovo, il confine politico e giuridico tra regole ed eccezioni, come è nel titolo di questo volume.

190 Na elucidation in Cappellini, Paolo. *Systema Iuris I: Genesi del Sistema e Nascita dela 'Scienza' delle Pandette*. Giuffrè Editore, 1984. p. 564-565: "Quell'analisi è infatti significativamente esemplata ancora una

The influence of Roman law on later legal systems can be seen in the connection between various legal institutions, from common law equity and remedies to medieval assumpsit and the theory of cause in continental contractual doctrine. Despite the vast scope of exceptions, as will be demonstrated, it is surprising that postmodern theories do not utilize the concept of exceptions to develop a critical pattern of schemes. This highlights the enduring significance of Roman law in shaping the legal landscape and its continued relevance in contemporary legal thought[191].

The concept of *ius commune* emerged from a perception of a declining tradition, disseminated in the Visigothic and Burgundian kingdoms as a degraded composition, built upon the remnants of a grand civilization. From the early period of the Roman Empire's disintegration, it was important to maintain unity by claiming a chain of legitimacy through the reproduction of Roman laws as local laws and by using this mechanism to enforce obedience to a law that had the same effects as the Roman laws.

The fusion with indigenous institutions was not immediate, but rather a gradual process of blending[192]. This gradual integration highlights the adaptability of the legal system to

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volta su di una famosa critica (di derivazione agostiniana) allo scetticismo: in via di fatto l'ordinamento viene implicitamente riconosciuto incompleto, perché sarebbe difficile negare per ogni singola legge la sussistenza di un rapporto regola-eccezione. Ma ciò che a livello di logica naturale e immediata – e quindi anche a livello di *materia* del sistema – appare incontrovertibile, non è più tale (o meglio non deve essere più tale) una volta introdotta la nozione complessiva di sistema."

191 Hart, Kevin. *The Trespass of the sign: deconstruction, theology, and philosophy*. Cambridge University Press, 1989. p. 82-83: "The constant target of deconstruction, I have argued, is totalisation. Some content has already been given to this notion in the preceding chapters and I shall examine it in more detail in part II. We need now, however, to study 'totalisation' from slightly different perspective, from that of axiomatics. The epoch of onto-theology can be viewed, Derrida tells us, as an assemblage of various systems, each of which is based upon a small number of axioms, or archai. Taken by itself this is a familiar thesis. In any formal system there will be various archai which compete for the role of the most indispensable: the principle of non-contradiction and the principle of identity are perhaps the strongest contenders. Less familiar, yet more controversial, is the claim which Heidegger and Derrida both advance that these formal and apparently empty principles are themselves grounded in metaphysics. Upon Derrida's reckoning, the archai are in fact held to be moments of irreducible presence. Instances abound: '*eidos*'(Plato), '*ousia*' (Aristotle), '*esse*'(Aquinas), 'clear and distinct ideas'(Descartes), 'sense impressions'(Hume), '*Geis*t'(Hegel), 'logical simples'(Russel), 'pre-reflective intentionality' (Husserl), and, more problematically, 'Being'(Heidegger). With Plato, for instance, the account of Being as eidos is entirely unrevisable; it is the fixed centre of the system, the governing principle of its structure and the sole element which escapes structurality."

192 Monateri, Pier Giuseppe. "Black Gaius: A quest for the multicultural origins of the Western legal tradition." *Hastings LJ*, vol. 51, 1999, p. 479. Bernal, Martin. *Black Athena: The Fabrication of Ancient Greece, 1785-1985*. Rutgers University Press, 1987. Professor Monateri draws inspiration from Martin Bernal's influential

changing circumstances and the ability to incorporate new elements while maintaining the core principles of the law[193]. The Christian tradition only accelerated this process, allowing for a theological and spiritual justification that previously claimed authority from the emperor.

For a pluralistic order embedded in the complexities of *ius commune*, the refined Roman Law provided guidance for the development of a new society, in which rules were meant to provide simplicity while maintaining the juridical sophistication that new enterprises required[194].

work "Black Athena: The Afroasiatic Roots of Classical Civilization," which challenges the conventional notion of a "pure" ancient Greece and asserts that the cultures of Africa and the Near East heavily influenced Greek civilization. This argument has sparked intense debate and has been widely praised and heavily criticized for its controversial claims. The book has generated significant discussion in the fields of Classics and Afrocentrism. However, in the introduction to his work, Professor Monateri signals a different intention. He seeks to question the assumed role of Western legal traditions and to shed light on the multiple interpolations, receptions, and cultural dialogues that shaped the formation of canonical juridical diplomas. Monateri aims to broaden our understanding of the complexities and interconnections of legal cultures and systems by exploring these themes.

[193] Those hostage's compensation arising from a blood-feud in ancient Germanic law were part of a formal ceremony in which a straw (festuca) is handled to the creditor, and in the following moment to the surety, conferring him the power to go against the debtor. When the debtor lacked producing a surety or paying, he would make himself personally liable before the creditor. The reception of Roman Civilization costume converted the formality into a written instrument, transferred to the creditor along with the *wadia*. The addition of the requirement of a seal becomes the English covenant. This ritual also provides an insightful explanation for the German Law clear distinction between *Schuld* and *Haftung*. For a comprehensive account of English reception of Germanic ancient Law see AMES, James Barr. Lectures on Legal History and Miscellaneous Legal Essays, London: Oxford University Press, Cambridge, Harvard, 1913, pp. 97.

[194] Anaxagoras apud Fritz Schulz on Principles of Roman Law, 1936, Oxford: at Clarendon Press, p. 19: "In the beginning all things were as one. Then came understanding, distinguished between them and created order." See Carnelutti, Francesco. *Tempo Perso*. Sansoni, 1959, p. 56 : « Il problema della giustizia si risolve dunque nel problema dell'ordine; ma l'ordine chi lo afferra? Questa è la difficoltà, che non permise ai farisei di comprendere il pensiero di Gesù, la cui chiave è nella frase più enigmatica del Sermone della montagna: 'io non sono venuto per sciogliere la legge e i profeti ma per completarli' (Matteo, V, 17). Cosa si può essere dunque sopra la legge? Dal medesimo Maestro è venuta la riposta: 'ora io vi dico che qui v'ha uno al di sopra del Tempio' (Matteo, XII, 6). Poiché, nell'episodio dei discepoli, che hanno spigolato il campo di grano, la legge è raffigurata nel sabato, Gesù chiarisce ancor meglio quando conchiude che 'il Figliuolo dell'uomo è padrone anche del sabato' (ivi, 8). Ciò significa che l'ordine, nientemeno, a sua volta si risolve in Dio. Gesù medesimo, a proposito dell'eccezione fatta per i suoi discepoli alla regola del digiuno (Matteo, IX, 17), insegna, con la metafora del vino nuovo immesso nel vecchio otre, che l'eccezione è, a sua volta, una legge (la quale, se s'introduce nella legge, a cui deroga, la fa saltare); ma se l'eccezione è una legge, patisce eccezione a sua volta e quest'altra eccezione, per essere pur essa una legge, patisce ancora eccezione…" Insights referring to Ernest Hovking's Justice, Law and the cases, in Interpretation of modern legal philosophies, 1947, 336.

One of the most valuable contributions of Roman Law is providing coherence to the present-day legal code's conformation, not because Roman Law rules society from the grave[195], but because it offers clues on how detachment from religion and politics occurred[196].

Roman legal sources' citation bears prestige and authority to Law's advancements, generating the belief that legal doctrine invoking its authority is embedded with the magical characters attributed to Roman jurisprudence. Such an attempt is not exempt from complications. Most modern doctrinal and jurisprudential problems result from previous adjustments between current societal modes and their original Roman roots. Issues arising from gifts, formless agreements, the theory of causa[197], and consideration are evidence of the frictional interplay between ritualized procedures to achieve formation and the prevalence of consent as the primary trigger of binding agreements[198].

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[195] Vinogradoff, Paul. *Roman law in mediaeval Europe*. The Lawbook Exchange, 1909. p. 4: "The story I am about to tell is, in a sense, a ghost story. It treats of a second life of Roman Law after the demise of the body in which it first saw the light. I must assume a general acquaintance with the circumstances in which that wonderful doctrinal system arose and grew."

[196] Riccobono, Salvatore. *Corso di Diritto Romano: Stipulationes. Contractus. Pacta*. Anno Accademico 1934-1935. Dott. A. Giuffrè editore. 1935-XIII, p. 8: "Alla povertà della vita economica e sociale di Roma primitiva corrispondeva la povertà delle figure e forme giuridiche; congiunta ad uno rigorismo inflessibile di riti e di parole, che è proprio dei diritti primitivi. All'accresciuta ricchezza, con l'espa nsione del dominio di Roma su vasti territori, doveva seguire necessariamente un rapido e meraviglioso sviluppo di relazioni d'affari e di commerci, che non potevano essere regolati e tutelati dall'angusto e rigido diritto dei Quiriti. Onde si venne formando, per necessità, un nuovo ordine giuridico nella prassi del *praetor peregrinus;* il suo *ius gentium*. La 'stipulatio'divenne subito *iuris gentium*, per assumere su di sé tutto il compito di sopperire alle angustie del diritto nazionale romano, e di seguire con la sua agile struttura. Tutto lo sviluppo della vita e dei commerci." One relevant observation noted by Riccobono is that every society is triggered to evolve as the transactions between its members grow in complexity.

[197] Gordley, James. *The philosophical origins of modern contract doctrine*. Clarendon Press, 1991. p. 49: « As we shall see, in all likelihood Bartolus and Baldus formulated the doctrine with this distinction in mind. Nevertheless, they were not attempting to explain Roman law systematically by Aristotelian principles. They merely found Aristotle helpful in interpreting their Roman texts. One key text stated: 'When there is no causa, it is accepted that no obligation can be constituted by an agreement; therefore a naked agreement does not give rise to an action although it does give rise to a defence (*exceptio*). »

[198] See Gordley, James. *The Philosophical Origins of Modern Contract Doctrine*. Clarendon Press, 1991. p. 41: "The role of consent: A number of medieval jurists concluded that, in principle or by nature, contracts were binding by consent. The distinction between nominate and innominate contracts was merely a matter of Roman or positive law. The late scholastics found this conclusion congenial because, like Thomas they regarded promises as binding and thought that consent was essential to a promise. Nevertheless, the medieval jurists did not arrive at it by borrowing ideas from Aristotle or Thomas. Nor did they do so, as has sometimes been suggested, by borrowing the teaching of the Cannon law that it is sinful to break a promise. They arrived at this conclusion gradually through reflection on their Roman texts. It was not alien to the texts themselves. Indeed, one cannot point to a moment when this opinion represented a genuinely new insight. P. 129: "There is no doubt that Pufendorf and Barbeyrac believed they were engaged in an intellectual revolt begun by Grotius against the scholastic tradition. Oddly enough, however, it seems to have been a revolt without a principle. Pufendorf and Barbeyrac were not commited to any new philosophical principles. Grotius had not broken with

When studying Gaius' Institutes, it becomes clear that before rights became a separate category, with their own means of justification and protection from a higher authority, the entire legal system was classified into three categories: persons, things, and actions. Gaius' approach highlights the simplicity and practicality of the early Roman legal system, where the focus was on the individuals, objects, and actions involved in a legal matter, rather than on abstract concepts such as rights. This categorization also reflects the evolution of legal thought over time, as the concept of rights became increasingly important in shaping legal systems and protecting individual freedoms. As an illustration, Gaius' book III inaugurates the treatment of obligations by offering an encompassing synthesis while asserting: "*88. Nunc transeamus ad obligationes, quarum summa diuisio in duas species diducitur: Omnis enim obligatio uel ex contractu nascitur uel ex delicto*." Romans' preoccupation with actions instead of rights conduces to a reflection on modern conceptions of the importance of rights instead of actions. Gaius' institution's classification of actions as rights in exercise composes a third of the entire arrangement of his institutions. Gaius chosen classification instigates questioning modern code drafters' determination to prioritize rights over actions, a decision that would, in turn, lead to fierce debates over the place of actions and substantial rights. Instead, it is also worth mentioning the exceptiones placed under the Law of Actions in the Institutes.[199]

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those of Aristotle and the scholastics. Such a revolt is not the contradiction in terms it might appear. We have already seen examples of intellectual continuity despite a change in philosophical principle, and of great change despite continuity in principle. What matters is not only the principles but the project or task to which the principles are applied. Post-Glossators such as Bartolus and Baldus believed in Aristotelian principles unknown to the Glossators, yet little change took place…(anotar das fotos) p. 231: "The lesson to be learned is that law is inherently incoherent. It cannot be based on neutral principles. Consequently, it cannot be more than a smokescreen concealing the efforts of the stronger to prey on the weaker." See also See Gordley, James, and Von Mehren, Arthur Taylor. *An Introduction to the Comparative Study of Private Law: readings, cases, materials*. Cambridge University Press, 2006. p. 421: "Actually, it is misleading to compare causa and consideration since the doctrines were devised for different purposes. The continental doctrine identified the reasons why, in principle or theory, a promise should be enforced. The common law doctrine was a pragmatic tool for limiting the enforceability of promises." An important observation considering that at first glance, causa and consideration partake some resemblances, except for Maine's perennial warning that substantive. And also Von Mehren, Arthur T. "Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis." *Harv. L. Rev.*, vol. 72, 1958, p. 1009.

[199] Zulueta, Francis de. *The Institutes of Gaius, Part II commentary*. Clarendon Press, 1953. Book IV, pp. 115-125.

For Savigny, Roman Law constituted "*for all the important deviations from pure Roman Law, as for example, the actionability of all contracts without the stipulation, the more extended importance of bona fides, have never been peculiar to the German Empire*[200]*, but have everywhere been uniformly recognized to the the exact extent to which the Roman Law has been applied in modem Europe*"[201]. Pandecist school's influx was broadly received across jurisdictions as the advancement of legal science and the necessity of revamping a system resuscitated after a millennial hibernation, producing clashes once confronted with nonexistent Roman realities such as substantive rights granted by states.

According to Kaius Tuori's analysis of the 19th-century Roman Reception, German scholarship claims that the influence of Romanist legal thought was crucial in sophisticated German legal science when the need to emulate the Napoleonic Codification arose. This was necessary in order to spread German influence on jurisdictions that were willing to adopt European legal knowledge into their own systems[202]. This highlights the importance of the Roman legal tradition in shaping legal thought and the continued relevance of Roman law in shaping modern legal systems.

Windscheid attributed Savigny's perception of Roman Law's reception as "a falsification of current juridical consciousness."[203]. For Windscheid, the intent of the Historical

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[200] Santner, *My Own Private Germany*, p. 145: "Schreber's cultivation of an ensemble of 'perverse' practices, identifications, and fantasies allow him not only to act out, but also to work through what may very well be the central paradox of modernity: that the subject is solicited by a will to autonomy in the name of the very community that is thereby undermined, whose very substance thereby passes over into the subject. Schreber's phantasmatic elaboration of that paradox allows him to find his way back into a context of human solidarity without having to disavow this fundamental breach of trust, without having to heal it with a 'final' and definitely redemptive solution." As mentioned earlier, Daniel Paul Schreber was a jurist suffering from a delusional state. However, unlike other patients intimately experiencing a mental breakdown, Schreber wrote his memories exposing his delirious schemes and nervous contact with God. Under Santner's scrutiny, the correlation between his investiture crisis and the degeneration of legal wreckage of void conceptualism embodied during the ascension of the Third Reich becomes nitid.

[201] Von Savigny, Friedrich Karl. *System of the modern Roman Law*. J. Higginbotham, 1867. p. 4.

[202] Tuori, K. "The European Narrative and the Tradition of Rights." *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge Studies in European Law and Policy). Cambridge University Press, 2020, pp. 221-262.

[203] Windscheid, Bernhard; Muther, Theodor. *Polemica intorno all"actio"*, translated and introduced by Giovanni Pugliese. Sansoni, 1954. p. 192: "*Sappia questi, che io ho né conosco personalmente il Prof. Windscheid. Né mai mi sono trovato in alcun rapporto personale con lui, che anzi nutro ogni stima per il vigoroso sforzo e il*

School was not to teach Roman Law but to build an a priori Roman system according to assuming that constructions of the time corresponded to what Romans conceived for their own[204].

Despite the disagreement among authors, which will be addressed at a later time, the issue of falsification is of great importance. Regardless of the level of interpretation, whether it is in the realm of doctrine or in its application, adapting mental concepts to reality requires an unattainable level of objectivity[205]. Even when evaluating a recently enacted law, there is already a significant likelihood that it will not align with the opinion of legal experts. This highlights the difficulty in achieving a consensus among the legal community and the inevitable rooting and falsification of a law as soon as it is enacted.

It becomes clear that the Roman exception system differs significantly from the one received in modern substantive law. This difference highlights the evolution of legal thought and the continued adaptation of legal systems to changing circumstances[206].

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diligente studio di questo autore e riconosco interamente i suoi meriti, di non poco rilievo per la scienza. Solo, forse, sono 'personalmente irritato', in quanto egli non attesta la dovuta stima a uomini, che saranno l'orgoglio della nostra Nazione e della scienza ancora in tempi remoti, che io perciò venero nel più profondo dell'anima, come per esempio Savigny e Mühlenbruch; egli invero attribuisce loro una mancanza di perspicacia, che li avrebbe condotti 'alla falsificazione dell'attuale coscienza giuridica'."

[204] Windscheid, Bernhard; Muther, Theodor. *Polemica intorno all"actio"*, translated and introduced by Giovanni Pugliese. Sansoni, 1954. p. 6.

[205] Astuti, Guido. *I contratti obbligatori nella Storia del Diritto Italiano. Parte Generale, Volume Primo*. Dott. A. Giuffrè Editore, 1952. p. 24: "E allora, si domanderà a questo punto, i principi informatori dei contratti non presenta mai nulla di nuovo? Al contrario: come dicevamo all'inizio di queste considerazioni molteplici e notevoli, sia in ordine alla formazione e ai requisiti di validità dei contratti, sia in ordine ai loro effetti giuridici, obbligatori o reali. Basterà ricordare la specialissima influenza esercitata dal sistema processuale formulare del diritto romano classico, sopra il regime sostanziale delle *obligationes ex contractu*, modellatosi secondo la particolare struttura delle relative *actiones*, e gli sviluppi del sistema contrattuale nel diritto postclassico e giustinianeo, in correlazione con la caduta della procedura per formulas. Ma qui possiamo far punto, ed entrare ormai nel vivo della nostra indagine, cominciando precisamente dallo studio della formazione storica del sistema contrattuale romano."

[206] See Riccobono, Salvatore. *Corso di Diritto Romano: Stipulationes. Contractus. Pacta. Anno Accademico 1934-1935*. Dott. A. Giuffrè editore, 1935. XIII, p. 318: "La falsificazione si vede dall'ordine, dove la *stipulatio* è relegata anche dopo il *pignus*. Invece, il primo posto doveva essere assegnato nel testo alle figure di *ius civile*; *nexum*, *mancipatio*, etc. Ma con ciò si rende manifesto il motivo che ebbero i Compilatori di omettere anche qui i tipi caduti in desuetudine e di collocare al posto di essi, come al solito, *emptio*, *locatio* etc." The author dedicates this study to observing the intricacies necessary to form the Roman juridical fictions, which was an achievement in edifying a complex of instruments to operate an already complex system. See also Sharp, Malcolm P. "Pacta sunt servanda." *Columbia Law Review*, vol. 41, no. 5, 1941, pp. 783-798 on the exceptions of this principle such as duress, undue influence.

However, as weak as a derivative construction can be, it serves the purpose of tracing the roots, separating similar and divergent patterns, assembling them back, and approaching them, deploying similar methods.

The tendency to explain rights through the exercise of *actiones* was fundamental to advancing civil procedure since the theory bears on Roman legis actiones[207], having such debate occupied scholars on Civil Procedure for a century. Riccobono's awareness of the Roman System's functioning allowed him to declare, "It has been well said that Roman Law is not a system of laws, but rather a system of actions"[208].

The reliance on rights during the codification era, along with the claim that Roman law was a codification attempt by Justinian, led to a misperception that rights could replace Pretorian constructions and adjudicatory roles[209]. Instead, it transferred the topic of actions to

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[207] See also the debate in Luzzato, Giuseppe Ignazio, *Per un'ipotesi sulle origini e la natura delle obbligazioni romane*. Giuffrè, 1934. II, p. 253-254: "*L'ipotesi, in quanto fa della sponsio un negozio di garanzia da parte di terzi, non corrisponde all'essenza di questa nel diritto romano classico come promessa verbale solenne, sia essa da parte del debitore che di terzi, e non corrisponde neppure al significato letterale di spondere = promittere che ci vien dato in proposito dalla grandissima maggioranza delle fonti relative. Essa corrisponderebbe se mai letteralmente di più alla stipulatio da stipulum, bastoncello se per questo si intendesse un simbolo analogo alla festuca, wadia germanica, di sovranità del creditore sul garante o sulla cosa data in pegno, e per questo lato si potrebbe anche forse spiegare come al rapporto sia rimasto il nome di stipulatio, desunto dalla forma più antica di garanzia, come nella germanica Wadiatio, e non dal sopravvissuto promettere e dal più recente fidem facere; ma ad una tale spiegazione osterebbero le fonti, che intendono Stipulum cine aes signatum, e che accennano quindi ad una prestazione pecuniaria, onde stipulatio non sarebbe che spondere in denaro*." Weber, Max. *Law in Economy, and Society [1925]*, translated by Edward Shils, Harvard University Press, 1954. p. 115: "the development if a unified law of obligation was certainly derived from the action for tort. The delictual liability of the entire kinship group was, for instance, the source of the widespread joint liability of all kin or house community members for the performance of the contract made by one of them. However, the development of the various actionable contracts largely proceeded along its own ways. The entry of money into economic life often played the decisive role. Both primitive forms of contract in Roman *ius civile*, viz., *nexum,* the debt contracted by symbolic pledge, were money contracts. This fact, which is clear for the nexum, seems also to be certain for the stipulatio. As to both, the connections with the precontractual stage are clear. They were rigorously formal oral transactions and they required that the necessary acts be performed by the parties themselves. Both have the same origins. As to the stipulation we may agree with Mitteis who, on the basis of analogies in Germanic law, regards it as having originated in procedure, outside of which it originally played only a very modest tole, essentially in connection with agreements on such collateral terms as interest and similar matters." Weber presents a controversy between Mitteis, with whom he agrees, and Luzatto et al. l. on the origins of obligations regarding the procedural sources of legis actio and obligations.

[208] Riccobono, Salvatore; Nathan, Edward. "Outlines of the evolution of Roman Law." *University of Pennsylvania Law Review and American Law Register*, vol. 74, no. 1, 1925, pp. 1-19.

[209] Calasso, Franceso. *Il negozio giuridico: lezioni di storia del Diritto Italiano*, 2nd ed. Dott. A. Giuffrè, 1959. p. 219: "*Nella obligatio contratta per semplice consenso, è necessaria una speciale forma di convenzione perché ciò che è stato pattuito possa legittimare all'actio. Al contrario, se la pattuizione è stata compiuta nella forma civile (stipulatio o cyrographum), ha luogo l'actio secondo il diritto civile, ma se una naturalis causa*

the discipline of civil procedure, coinciding with criticism from emerging civil procedure theory regarding the nature of actions separated from their Pretorian constructions. The abstract theory and autonomy of actions allowed civil procedure to separate from its substantive aspect, leaving behind the Roman theory of concrete actions. However, these fiction-based theories began to show cracks when substantial reforms of contract law coincided with significant changes in the functioning of the judicial apparatus[210].

The first goal is to uniformize and simplify the contractual theory had an underlying intent of shifting the exercise of power, the adjudicatory one, to new spheres of influence. A far-away concept to Roman Law and formulas are smart contracts, a pervasive instrument for reducing transaction costs under the epistemology of Law and Economics. The conceiver of the idea, Nick Szabo, provides a legal framework intending to merge contractual clauses under hardware and a software unit, using as a rudimentary example the vending machines to prevent a breach or make it nearly impossible [211]. The goal is to merge the figure of intermediary and adjudicator, in the sense that: "Smart contracts often involve trusted third parties, exemplified

non è intervenuta (per es., la prestazione), vi ha luogo l'exceptio pretoria: ...quamvis enim per hec, id est actum verborum seu litterarum, obligari possim, oportet aliud quid intervenire ob quod obligari velim."

[210] Maine, Henry Sumner. "Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas. 1861." *New York: Dorset*, 1986, p. 26: "But I now employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman *Responsa Prudentum* as resting on fictions. Both these examples will be examined presently. The fact is in both cases that the law has been wholly changed; the fiction is that it remains as it always was.

[211] See the assuring words of Mattei, Ugo. "Basics First Please! A Critique of Some Recent Priorities shown by the Commission's Action Plan." *Towards a European Civil Code*, edited by Arthur Hartkamp, Martjin Hesselink, Ewoud Hondius, Carla Joustra, Edgar du Perron, Muriel Veldman, 3rd ed. Ars Aequi Libri [u.a.], 2004. p. 297-304: "Legal hegemony of the English language coupled with the imperialism of Economics in social sciences, is conspiring to produce the development of an all-inclusive non-technical notion of contract as a fundamental legal framework for a free market. Contract is successfully competing with institutional ideas of corporation and with public law ideas of hierarchy, in the governance of markets. Outsourcing, downsizing, and privatization, all put an economic notion of 'contract' at the centre of the scene. Contracts are the tool through which the surrender of the political process to market forces is maintaining a façade of legality." See also Eörsi, Gyula. "The validity of clauses excluding or limiting liability." *The American Journal of Comparative Law*, vol. 23, no. 2, 1975, pp. 215-235: "Capitalism arrived at a stage where the illusion of free contract automatically ensuring fair balance on the market had gone. Liberté had devoured égalité, and fraternité was succeeded by the fierce competition of industrial giants."

by an intermediary, who is involved in the performance, and an adjudicator, who is invoked to resolve disputes."[212]

The ineluctable resemblance of a cryptographic format and the undecipherable Roman formulas to conceal meaning behind a sphinx is synthesized on pontifex's as "the one who made or kept in order the pontes or 'paths' between the world of the living and the world of the gods and of the dead"[213]. If rights were exercised and enforced in another realm, the consequence is taking away the State's adjudicatory power, suppressing a critical mission arising from Law and the exceptiones narrative. They come from a juridical construction.

That actions and rights divide left a not-yet-tested hypothesis for the emergence of rights and the disregard for the exceptiones or counter-rights as they also became rights. A stage of unawareness marked the beginning of this process since the State as the grantor of those rights, had the incumbency of being the bearer of rights manifestation through legal documents. Instead of placing the narrative on parties' disputes and intercalations, the State concentrated influence and centralized power once exercised by diverse organizations.

Oaths and promises were commonly recognized categories that existed before codification. However, when the transactions that provide certainty disappear, these categories need to be reevaluated. In its secularized form, an oath becomes a promise when the magic powers once exercised by divine forces are transferred to the freed subject - an individual who has been emancipated from divine influence and its symbols. Historically, faith was placed in rituals to secure divine protection, but over time, it shifted to words and later to contracts. This evolution highlights the changing perceptions of the role of divine influence in human relationships and the emergence of secularized forms of social organization.

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[212] Szabo, Nick. "Formalizing and securing relationships on public networks." *First Monday*, 1997.
[213] Kent, Roland G. "The Vedic Path of the Gods and the Roman Pontifex." *Classical Philology*, vol. 8, no. 3, 1913, pp. 317-326.

The *legis actio sacramenti* (Gaius, IV) contained rites ensuring "perfomative efficacy of the oath" in the trial. Agamben's reasoning on the relationship between oaths and trial encompasses Aristoteles' distinguishing promissory and assertorial oaths allowing for breaking an oath or committing perjury[214]. It is important to note that the distinction between the promissory oath and the assertorial oath still holds significance today. The promissory oath is a manifestation of the parties' will as they enter into an agreement, while the assertorial oath binds the oath giver to what has been asserted. As a result, a breach of the promissory oath leads to a breach of contract, while perjury results from a false assertion made under an assertorial oath. The distinction between these two forms of oaths is relevant in a trial as they are both forms of evidence collection in a dispute.

The influence of Roman law on modern legal systems is evident in the efforts of the German Pandectist school to incorporate it as the foundation of contemporary legal thought. This demonstrates the ongoing relevance of the Roman legal tradition in shaping modern legal systems. In trials, parties argue based on these constructions, with the oath serving as an early tool for collecting evidence in disputes. Adherence to the Roman past was not a straightforward process, but rather a result of extensive intellectual effort to connect to a distant past and attain prestige. The German Pandectist school, for example, reestablished the German legal tradition by incorporating Roman law as the foundation for contemporary legal thought.

On its turn, contemporary tradition is more inclined to refuse Roman Law to live a "*second life*" in a tendency to erase historical accounts of legal institutions in favor of a legal process approach. However, juridical knowledge still heavily relies on those Roman sources as the glue among the system's entirety, regardless of the artificially of such construction. The more legal science attempts to achieve objective understanding, the more baffling it becomes

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[214] Agamben, Giorgio. “The Sacrament of Language: an archeologia of the oath,” translated by Daniel Kotsko. *The Omnibus Homo Sacer*. Stanford University Press, pp. 345-350. See his reference on the fragments on the works of Aristotle.

to come out with a consistent solution ignoring the shared legal past, regardless of the tradition in which a solution is needed. Despite this, Roman sources continue to play a significant role in shaping the legal system as a whole, and ignoring this shared legal past becomes increasingly challenging as the legal system strives for objective understanding.

In Forms of Action at Common Law[215], Maitland quoted Henry Maine's observation, "*so great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure*"[216] to acknowledge the impossibility of delivering a course of lectures on actions without confronting a moment in time in which rights and actions were indistinguishable. However, another relevant passage of Maine's remarks also deserves mention for it reasoned on the process describing "*The primary distinction between the early and rude, and the modern and refined, classifications of legal rules, is that the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law*"[217].

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[215] Maitland, Frederic W. et al. *Equity: A Course of Lectures*, edited by A.H. Chaytor & W.J. Whittaker. 2nd ed. Cambridge Univ. Press, 1949. p. 12.

[216] The idea expressed by Henry Sumner Maine in his book "Dissertations on Early Law and Custom" is that there is a distinction between early and modern classifications of legal rules, with the latter being more refined. According to Maine, in early legal systems, the rules relating to actions, pleading, and procedure held a prominent place and were considered to be Adjective Law, whereas in modern legal systems, these rules have become subordinate. This shift was also reflected in the Roman Institutional writers, who placed the Law of Actions in the third and final compartment of their system. Maine notes that this arrangement was not easily or naturally suggested to the mind, as the Law of Actions held a great deal of influence in the early stages of the development of courts of justice. In these early stages, substantive law appeared to be gradually secreted in the interstices of procedure, and the early lawyer could only see the law through the envelope of its technical forms. This passage is considered one of the most important quotations in legal history, as it highlights the evolution of legal systems and the changing importance of different aspects of the law. Maine, Henry Sumner. *Dissertations on early law and custom*. J. Murray, 1883. p. 389: "The primary distinction between the early and rude, and the modern and refined, classifications of legal rules, is that the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law. So far as this the Roman Institutional writers had advanced, since they put the Law of Actions into the third and last compartment of their system. Nobody should know better than an Englishman that this is not an arrangement which easily and spontaneously suggests itself to the mind. So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." The passage in which Maine engraves on of the most important quotations in legal history.

[217] Maine, Henry Sumner. *Dissertations on early law and custom*. J. Murray, 1883. p. 389.

So far as this, the Roman Institutional writers had advanced, since they put the Law of Actions into the third and last compartment of their system. Both were alluding to an intricate differentiation process that lost its blurred contours before the eyes of a modern jurist. The schism has significant implications for comprehending the exceptions and controverted rights allocation in Private Law. *Exceptiones* were first conceived as defenses, as already explained in the introduction. If this information is provided beforehand, it becomes more evident to relate its operation when disputes arise. Normality does not require raising exceptions. However, the breach of a promise, constituting breaches in general, hardship clauses, and force majeure occurrences justify entering the exception. A long development was required for every sophisticated idea jurists created over the centuries.

However, another story on genealogical and sociological programs must be clarified to enter the terrain of how the Law evolved to provide numerous devices for situations once raised judicially.

For the jurists to arrive at the distinction between private autonomy and *iurisdictio*, a significant challenge was posed for glossators and later for humanists since by distinguishing those two concepts, an idea of private order arising from agreements emerged. The opening for private autonomy to become the driving force of society unleashed an unprecedented force on freedom of transactions and repositioned the individual to a higher level of importance. However, for a society still guided by theological and moral values, disposing of wealth demanded a subjective dimension as the legal justification for the transfer of power[218].

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[218] Calasso, Francesco. *Introduzione al Diritto Comune*. Dott. A. Giuffrè editore, 1951. pp. 202-203: "In questa, che oggi chiameremmo dottrina generale del diritto, motivo fondamentale nel pensiero dei glossatori era stato lo svolgimento parallelo dell'autorità dello Stato (*iurisdictio*) e della autonomia della volontà privata, misurata dall'elemento oggettivo dei negozi (causa). Su questo terreno troviamo la riposta al quesito che la nuova fase storica ci prospetta. Codesto parallelismo persiste, ed anzi se accentua. È proprio a cavaliere del Trecento che la sovranità dello Stato viene teorizzata con vedute più libere da postulati antichi, che l'avevano in certo senso sommersa nella concezione dell'Impero universale: adesso lo Stato emerge, concentrando dentro la sua orbita la stessa somma di poteri che l'Impero esercitava universalmente, ma fuori della sua orbita rimanendo soggetto all'Impero. La sua sovranità interna è autonomia di fronte all'ordinamento universale: nasce la formula 'rex in regno suo est imperator'. Questo fenomeno ha il suo perfetto riscontro nella storia del negozio giuridico: la volontà privata, che nella fase storica precedente era stata concepita in una dipendenza completa dalla volontà

Damages were remedies when self-help seemed not an appropriate solution for a societal constitution needing to consolidate central powers. However, a caveat must be added, the commonly understood Roman Law tradition constitute, in reality, the remnants of what the pandecist tradition believed was classical Roman Law in its pure form[219].

The mechanism by which Law reproduces reality was recorded in *lex* with the Twelve Tables, which provided the Roman citizenry with a certain degree of acquaintance with unknown oral rituals for celebrating agreements. Such innovation was introduced following plebeians' pleas for patricians' secrecy on the pontifical interpretation of formulas[220]. The exclusive knowledge on operating the logic grammar of *ius civile* conferred the privileged an

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dell'ordinamento giuridico obbiettivo (*lex*), e quasi immedesimata con queta, ora invece si afferma di fronte ad essa, con una sua propria forza e latitudine: e la scienza, che per l'innanzi aveva tenuto principalmente a mettere in rilievo il legame che ancorava la manifestazione della volontà privata all'ordinamento giuridico, adesso è portata piuttosto ad affermare il distacco. Il quale, se non crea un'antitesi fra i due elementi costitutivi del negozio, pone a ogni modo le basi di un vero e proprio dualismo, che prospetta all'interprete questioni gravissime, e, con particolare urgenza, il problema del superamento teorico di questo dualismi nella sintesi ultima, rappresenta dal negozio giuridico cui di dà vita."

[219] Levy, Ernst. *West Roman Vulgar Law: The Law of Property*. American Philosophical Society, 1951. pp. 202-203: "With the decay of the formulary procedure the essential nature of the classical action was definitely lost. The *cognition extra ordinem*, it is true, at times took advantage of what it could still use from the procedure of the past. The instructions of the governor to the *iudex pedaneus* may have drawn some elements from the old *formula*. The plaintiff in his complaint may have designated the *actio* with its old name or a new one in order to express his request in a short and approximate way. But such reminiscences were unnecessary. They did not change the fact that the particular *actio* had ceased to have its individuality which followed rules of its own with respect to prerequisites and consequences. It did not determine or delimit any longer the demands of the plaintiff or the pleas of the defendant. This, in principle, is equally true for all periods and types if the cognition procedure, and yet, there is again a distinct contrast between the attitude of Justinian's legislation and the of the preceding time. The jurists educated in the spirit of the classical tradition in Beyrut and Constantinople, had learned to think again in terms of *actiones* which now, indeed, served only as symbols or labels of substantive law concepts. Thus, it was a matter of course for these scholars to include in the compilation hundreds of old statements which discussed the availability, shades, and limits of an *actio*. […] This development, however, was preceded by a complete disintegration of the system of *actiones*. Emperors and jurists introduced fact patterns and stated legal consequences without providing for specific remedies. There was no need for that. To them the substantive law was not only of primary, it was of sole, significance. Where a right was recognized, its realization and enforcement by way of judicial proceedings followed as a matter of course. Thus, they employed *actio* and *agere* chiefly to express the right to sue or to refer to legal proceedings in general, or they used these terms as collective expressions for judicially enforceable claims. Rarely did they name a specific *actio* for the purpose of identifying a particular claim. Even less frequently did it occur to them to utilize the named of the classical types."

[220] Stein, Peter. *Roman Law in European History*. Cambridge University Press, 1999. p. 3, p. 82: "An influential example of the application of Ramist method to law in the *Dicaelogicae lib. III* of the German scholar Johannes Althusius which apperead in 1617. The sub-title indicates its aim: 'The whole law in force, methodically set out, with parallels from Jewish law, and supplemented by tables'. Althusius first distinguishes between law and facts, by which he means the transactions between persons which have effects in the law. Building on Connanus's idea that in the institutional scheme actions should be understood as covering not just legal proceedings but all human acts. Althusius developed the notion of *negotium*."

advantage on how to benefit from the Law. Roughly two centuries later, the same discontentment allowed a plebeian *pontifex maximus* to publicize undisclosed formulas, which Cappelletti et al. nominated as a procedural class weapon, allowing parties to assess with better accuracy the outcomes of an *actio*[221]. Defenses' capillarity into the system enabled unprecedented plasticity on *actiones* outcomes, with praetorial allowance for the recognition of duress or fraud pleaded as *exceptio*[222].

Lawmakers, while drafting legislation, observe the facts from reducible experience as a primitive form of legal language. Before the legal process drew scholars' attention to observe the forces at stake in order to pass legislation, comprising parliamentary committee's works in conceiving a legal diploma, the legal models transferred from experience to normative status were rudimentary[223]. Regardless of how rudimentary they were, they still fulfilled societal expectations, considering not all people were entitled to operate law devices. Previous awareness of Law commands Legal as a premise for compliance was not yet disseminated as it is today.

Throughout history, the ruling class maintained its position via similar mechanisms already documented in Roman Law: the lower classes ineptitude to enter transactions or to register property, the undersupply of currency to exercise commerce, the absence of an adjudicatory power to solve disputes, the constant surveillance of a superior authority thorugh violence ensuring the status quo of privileged groups – making so that the individual in the bottom of the social scale entrusted the immediate superior authority for their existence[224]. The

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[221] At 41.

[222] Stein, Peter. *Roman law in European history*. Cambridge University Press, 1999. p.10.

[223] Salmond, John William, and Patrick J. Fitzgerald. *On Jurisprudence*. 12th ed. Sweet & Maxwell, 1966. p. 44: "Rules of grammar are complied with, not as means to, but rather as part of, the correct use of language. Rules of etiquette and morals are observed, not as means to, but as part of, being polite and virtuous. Rules of law are obeyed not as means to producing and ordered, tolerable society: law-observance is itself part of what constitutes such a society."

[224] Weber, Max. *Law in Economy, and Society [1925]*, translated by Edward Shils. Harvard University Press, 1954. p. 105: "The 'contract' in the sense of a voluntary agreement constituting the legal foundation of claims and obligations, has thus been widely diffused even in the earliest periods and stages of legal history. What is more, it can also be found in spheres of law in which the significance of voluntary agreement has either

advance in the means of information distribution over the centuries dramatically increased, allowing for the rise of a more complex and differentiated society, where the state and the market became the dominant sources of power and influence. According to Weber, the development of modern bureaucracy, with its clear hierarchy and rules, played a crucial role in the establishment and maintenance of this new order. He believed that bureaucracy was essential for the efficient functioning of modern societies, as it provided a stable and predictable system for the administration of justice and the regulation of economic activity.

Additionally, the advent of printed books and pamphlets allowed the appearance of Protestantism in a moment when religion was the unifying cement of societies, whereas, in the secularized context of nation-States, the codified experience assumed the unification task[225]. There is a direct correlation between church's weaking unifying power and the consolidation of stronger states[226].

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disappeared altogether or has greatly diminished, i.e., in public law, procedural law, family law, and the law of decedent's states. On the other hand, however, the farther we go back in legal history, the less significant becomes contract as a device of economic acquisition in fields other than the law of the family and inheritance."

[225] Friedeburg, Robert Von. *Self Defence and Religious Strife in Early Modern Europe: England and Germany, 1530-1680*. Aldershot Hants England, Ashgate, 2002. p. 3: "In the medieval comments on Justinian's Code of Civil Law, to repel force by force is understood to be one of the features of the natural order of the world and thus part of the law of nature. Medieval and Early Modern thought on government retained an ambivalent attitude to this provision. Indeed, the debate on self-defence cuts across the issues of state-building, European intellectual connections and ideas about sovereignty. The history of self-defence is simultaneously located in various of current research on European religious strife, in which Protestants found themselves embroiled, and the specific context of what historians used to address as 'state-building'— for that process surely involved increasingly rigid ideas about the necessity to monopolise legal violence and curtail self-defence to the most narrowly defined incidences. On the one hand, any government was meant to be bound by divine law of nature as emanations of divine will."

[226] Calasso, Francesco. *Gli Ordinamenti Giuridici del Rinascimento Medievale*. 2nd ed. Giuffrè, 1949. p. 31: "*Quest'ultima muove ovviamente dal principio dela così detta statualità del diritto, teoria che vede cioè nello Stato il deus ex machina dela vita del diritto, e tutto il diritto riconduce allo Stato: risalente ala esaltazione hegeliana dello Stato come 'realtà dell'idea etica', come 'spirito ético, in quanto voluntà manifesta, evidente a se staessa, sostanciale, che si pensa e si conosce, e si compie ciò che as e in quanto lo sa.*" Advancements in technologies are followed by societal shifts. Law comes with innovations and revamps its institutional agenda to set an order allowing endurance in behavioral regulation. While writing on methodology in the historiography traced on Legal History, Calasso made valuable observations on some distinctions still accompanying and burdening normative and institutional aspects of Law. He makes a sharp distinction between institutional and normative observations while attempting to reconstruct the steps traversed from the Roman Law deterioration by retrieving the Roman past related to Italian-state emergence.

The essence of this passage lies in the exploration of the origins of order as canon and corpus, which are systematic compositions that trace a genealogical reconstruction of the past and demand an unwavering return to the foundational principles of legal order. Scholars have long sought to connect legal tradition to the prestige of Roman law, but as Vinogradoff argues, the creation of new traditions is nothing more than "*a ghost story*"[227] perpetuating the afterlife of Roman law after its physical decline.

However, the Savignian Pandectist school saw Roman law as bodiless, which provided a conceptual framework for the Bürgerliches Gesetzbuch (BGB). The paradox of the dead ruling the living, which applies to the private realm as well as Constitutional law, is evident in the authority of legal documents. This authority is attributed by legal theorists to various reasons, including intrinsic natural rights, a sovereign command, and, above all, the correspondence of State-Nation as the source of law production[228].

This correspondence creates a perception of permanent fracture between the given law and its respect for legal principles, but this bias can be transcended by recognizing that the categories of embedded legal systems are rooted in a moment of uncertainty much like the

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[227] Vinogradoff, Paul. *Roman law in mediaeval Europe*. The Lawbook Exchange, 1909. p. 04: "The story I am about to tell is, in a sense, a ghost story. It treats of a second life of Roman Law after the demise of the body in which it first saw the light. I must assume a general acquaintance with the circumstances in which that wonderful doctrinal system arose and grew."

[228] Bellomo, Manlio. *The Common Legal Pasto of Europe: 1000-1800*, translated by Lydia G. Cochrane. The Catholic University of America Press, 1995. p. 159: "This the ius commune contributed to creating a single juridical civilization in Europe, a civilization that was not feudal but fundamentally urban and solidly built on a number of firm and staunchly defended ideas: Imperium (which was public) and dominium (which was private); the liberty of the prince ("Quod principi placuit legis habet vigorem'; What pleases the prince has the force of law), and the need to oberve the precepts to which that liberty led, as a way to guarantee stability to power and to defend the life of the individual – in a word, the new value of sovereignty." *Ius commune* propitiated the terrain for creating a single juridical civilization in Europe characterized by a distinct set of firmly established and widely accepted ideas. The concepts of Imperium (public authority) and dominium (private property), the liberty of the prince (the principle that the prince's desires have the force of law), and the need to observe the precepts that accompanied this liberty in order to maintain stability and protect individual life were fruits of *ius commune* development. The author argues that these ideas helped to create a shared legal culture across Europe, solidifying the development of a unified legal system and establishing a new value of sovereignty. Individual liberty, balanced with the stability of power, was a significant contribution of the ius commune to Europe's legal and political landscape during this period.

entire juridical edifice. The tension between normativism and institutionalism, with realism occupying the space between, presents a challenge to every attempt to situate the present.

Individuals were once left in a state of permanent ignorance, with their fate and opportunities determined by birth and rank. This was a necessary condition for the formation of the nation-state as a geographical, political, and later identitarian unity. Non-noble subjects were kept uneducated in law, but the resurgence of the maxim *"ignorantia juris non excusat"* served as a device used by the state to increase awareness of the higher source of law given by the state. Social cohesion was based within the limits of the law, and awareness of its existence and commands was necessary for the formation of the new state.

In this context, juridical abstraction lost its meaning in the legal arena, as the categories that once allowed Roman law to reach its pinnacle disappeared, replaced by more mundane concerns related to the theological aspirations brought about by the church's indoctrination.

It was the mission of scribes, monks, ecclesiastical authorities, and legal actors in the coming centuries to restore Roman legal science to its former glory, requiring a long period of legal culture fermentation[229]. The degraded Roman law served as a palimpsest for composing

[229] *Ratio legis* refers to the underlying purpose or reasoning behind a law, which guides the interpretation of the law. At the end of the 13th century, it was no longer necessary for the ratio legis to be explicitly stated in the law, as it could be inferred and reconstructed by the interpreter. An evolution propelled by the increasing influence of natural law but still maintained differences between those who supplement the law by invoking equity (fairness) and those who only argue based on the meaning of the law. This difference in method still exists today. The role of equity in this context is to supplement the law when it is deemed necessary to achieve fairness in a specific situation. Those who support this approach believe that the law should be interpreted and applied in a way that considers the underlying purpose and fairness, even if it deviates from the strict letter of the law. On the other hand, those who argue based only on the meaning of the law believe that the law should be strictly followed as written, without any deviation for fairness or equity. For this evolution see Meijers, E. M. « Le Conflit entre L'équite et la Loi Chez Les Premiers Glossateurs. » *Études d'Histoire du Droit. Tome IV Le Droit Roman au Moyen Age. R. Feenstra*. Universitaire per Leiden, 1966, p. 142-156 and also Vaccari, Pietro. *Scritti di Storia del Diritto Privato*. Cedam, 1956. Pactum Vestitur Contractus Cohaerentia. La Concezione dei Patti Aggiunti della Dottrina dei Glosatori, p. 250: « *Delle forme svariate di vestimentum che, nella concezione dei glossatori, il patto assumeva consensus, res, litera, verba, rei interventus, contractus cohaerentia, soltanto le due ultime furono accettate dai canonisti, dai giureconsulti cioè che tanto hanno contribuito all'elaborazione del concetto moderno di contratto : questo fatto basterebbe da solo a mostrare l'importanza storica delle formule dei glossatori verso una concezione più larga del contratto ; varcare senz'altro lo schematismo romano dei contratti i nuovi interpreti nè sapevano nè potevano in un'epoca in cui il formalismo dominava ancora nella pratica ed antiche forme ridotte ormai a mere sembianze perduravano tenacemente. A tanto risultato poteva giungere soltanto una scuola che, meno preoccupata della parola dei testi romani e dell'antico sistema, partiva da una concezione diversa e superiore della base sulla quale si erigono i rapporti giuridici e della ragione comune che li governa. »*

local customs, ecclesiastical law, and a wide range of authoritative regulations until the Justinian sources were retrieved, forming a rich *ius commune* in which continental European legal cultures could share[230].

The development of the juridical science into German refinements in abstraction and generalization brought about concepts not yet achieved in the Napoleonic codification, such as the juridical act[231], since the German pursuit was addressing lawyers and jurists with the best level of precision and calculation in the legal language. Under constant destruction and rebuilding of the legal bases for Law understanding, the sociological differentiation process deeply resembles the Hegelian search for synthesis.

Felix Cohen alluded to Jhering's juridical dreams of perfect forms and juridical fictions manifesting in heavenly perfection, disembodied concepts freed from situational constraints where they could manifest their metaphysical essence. However, legal realists and critical legal

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[230] Markby, William. *Elements of Law Considered with Reference to Principles of General Jurisprudence*. Clarendon Press, 1874. p. 87, based on Savigny's teachings the author amalgamated intent and sovereign's enforcement of promises: "it is the sovereign command which created the obligation – in other words, which gives the contracts their binding force." See also Calasso, *Gli Ordinamenti Giuridici del Rinascimento Medievale*, 1949, p. 24-25 and *Introduzione al Diritto Comune*, p. 10.

[231] Zweigert, Konrad, and Kötz, Hein. *An Introduction to Comparative Law*. 2nd ed., translated by Tony Weir. Clarendon Press, 1994. p. 152-153: "The idea of 'legal act' is also far too abstract notion. For the German scholar, 'legal act includes not only the normal type of contract such as sale or lease and also the so-called 'real contract' namely that special agreement needed in German Law to transfer a real right or create a real right over another's property, but it also includes the contract at family law, such as the contract of adoption or the agreement made by the bride and bridegroom before the registrar at the marriage ceremony, and even includes the making of a will, the giving of notice to terminate or to rescind a contract, as well as, for example, the resolution to increase a company's capital made by a formal meeting of its shareholders. Although legal declarations of such diverse sources and significance fall within the concept of 'legal act', the BGB enacts rules about voidability on the grounds of error, deceit, or duress, about agency, conditions, and so on, which it solemnly asserts to be applicable to all legal acts of whatever type. This extreme position has proved an inexhaustible source of controversy about the range if application of these general rules." Again, see Schulz, Fritz. *On Principles of Roman Law*. Clarendon Press, 1936. pp. 66-67: "To any one coming from the world of medieval German Law into the world of Roman law the legal world suddenly appears more definite, simpler, more comprehensible; on the other hand, the heterogeneous and complicated German law with its labyrinthine legal configurations, on the other the simplicity in greatness the limitation to a few clearly recognizable themes, of Roman law. It should not be objected that medieval German law ought only to be compared with medieval Roman law, and that Rome, in the second and first centuries B.C. and still more in the period of classical law, had already left its 'middle ages' far behind. It is certainly 'permissible' to compare phenomena taken from different stages of culture with one another, in order by the contrast to be able to recognize the phenomena themselves more clearly; great care must then, however, be taken in drawing from such phenomena conclusions as to contrasts between the individualities of the peoples concerned." See for the most recent contribution on a comprehensive view on the developments of scholarly production towards nation-states consolidation and codification Bellomo, Manlio. *Breve Storia della Scienza giuridica dal Rinascimento medievale alla modernità in crisi*. Euno Edizioni, pp. 193.

studies scholars supplanted aspirations that a day will come in which juridical forms will resemble ideal triangles, spheres, and squares. The Law exists in the void, in the insides of unspoken meanings, and in the complexity of the human mind. An array of treatises portrays juridical certainties, while courts' reasoning is still unwieldy[232].

Regardless of how legal fictions are suspected of generating further controversies in the Law[233], they allowed for advances on multiple fronts, including allowing different situations in yet-to-be-granted forms of action[234].

Moreover, it is also necessary to consider the opposite phenomena occurring, which means the multiplication of legal diplomas and statutes conducing to the erosion of the concept of Law and the feasibility of achieving an awareness of enacted commands. The profusion of documents holding legal authority emanating from different sources often produces what Georges Ripert defined as the *le déclin du Droit*, constituting an excess of legislative production[235]. Those situations constantly resurface in a pendular movement, requiring either

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[232] Cohen, Felix S. "Transcendental nonsense and the functional approach." *ColUM. l. reV.*, vol. 35, 1935, p. 809.

[233] See Slade's case (1602). Baker, John Hamilton. "New Light on Slade's Case." *The Cambridge Law Journal*, vol. 29, no. 2, 1971, pp. 213-236. Slade's Case involved a claim brought by Thomas Slade against Thomas Morley for the repayment of a debt. The case was significant because it marked a shift in the common law system's approach to contract law. Prior to the case, claims for repayment of debt or other matters could only be pursued through a writ of debt in the Court of Common Pleas, a problematic and archaic process. However, by the time of Slade's Case, lawyers had succeeded in creating another method, enforced by the Court of King's Bench, through the action of assumpsit, which was technically for deceit. The legal fiction used was that by failing to pay after promising to do so, a defendant had committed deceit, and was liable to the plaintiff. The case was heard in the Court of King's Bench, which found in favor of Slade, and the decision was upheld on appeal in the Court of Exchequer Chamber. This decision marked a significant shift in the common law system's approach to contract law and solidified the use of assumpsit as a remedy for breach of contract.

[234] Sechler, Michael J. "Supply versus Demand for Efficient Legal Rules: Evidence from Early English Contract Law and the Rise of Assumpsit." *U. Pitt. L. Rev.*, vol. 73, 2011, p. 161 (how legal fictions propitiated Evolution).

[235] Ripert, Georges. *Le Déclin du Droit : études sur la législation contemporaine*. Libraire Générale de Droit e Jurisprudence, 1949. p. 49: "L'État a tout essayé. Pour juger son ouvré, il faut donc prendre chacune de ces interventions en la considérant dans son mécanisme juridique. Si la publicisation du droit est un instrument de progrès il faut que le mode d'intervention nous donne un résultat juridique supérieur à celui que donnait jusqu'ici l'application du droit privé. Il est trop facile de dire que l'État doit intervenir sans donner d'autre précision sur son action. Voyons de plus près comment il intervient. » p. 181 : « Contre la menace d'un changement de législation, le contrat a fourni pendant longtemps la sécurité. Étant à lui seul la loi des parties contractantes, il leur assurait par son intangibilité que leurs rapports juridiques ne seraient jamais modifiés. C'est dans le désir de maintenir cette sécurité que la jurisprudence civile s'est refusée à admettre la révision du contrat soit par une interprétation tendancieuse de la volonté des parties, soit par l'autorité du juge prétendant statuer en équité. »

the passing of a compilation or to govern through devices that weakens the citizenry's ability to conform to the excessive law production. However, the primordial times of Law production posed a rather diverse question: the insufficient differentiation of legal situations.

When one thinks of the gods of Olympus, their psychological complexities, and their involvement with human drama, one should also account for Chaos as the founding lapse of indetermination. The sophistication of Chaos heirs arose from continuous differentiation[236].

Following the stage of differentiation, the system replicates itself until successive inputs and irritation demand re-accommodation[237]. That process ultimately reduces complexity, not because the system is not differentiated enough, but because routines constitute means for innovative enterprise enclosed within the system. While prefacing Buckland's work on Roman Law, Peter Stein remarks on Roman Law replication operation and moments of collapse when experience no longer coincides with enacted legal documents is worth mentioning[238].

Rules and contracts are undergoing an uncanny event of resemblance in a point of convergence, in which the general command enacted by the sovereign authority starts to assume the same role performed by new contractual arrangements or all the other way around. Contract and Law began a process in which ultimately they will coincide, making it impossible for the disenfranchised to distinguish commands enacted from a consented superior authority or a juridical person. Those new contractual forms lack bilaterality, not in the old sense that

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[236] Lévi-Strauss, Claude. *La pensée Sauvage*. Plon, 1962. p. 17 : « Or, cette exigence d'ordre est à la base de la pensée que nous appelons primitive, mais seulement pour autant qu'elle est à la base de toute pensée : car c'est sous l'angle des propriétés communes que nous accédons plus facilement aux formes de pensée qui nous semblent très étrangères ». The sophistication of Chaos heirs arose from continuous differentiation. The same rationale applies to Maturana's biological theory of cellular evolution, transposed to Luhmann's sociological autopoietic theory. Baraldi, Claudio, et al. *Unlocking Luhmann : A Keyword Introduction to Systems Theory.* Bielefeld University Press, 2021. p. 126: "the individual case reveals a norm that not existed before-hand: *ex facto ius oritur*". Luhmann, Niklas. "Law as a social system." *Nw. UL Rev.*, vol. 83, 1988, p. 136.

[237] Baraldi, Claudio; Esposito, Elena; Corsi, Giancarlo. *Unlocking Luhmann: A Keyword Introduction to Systems Theory*. Bielefeld University Press, 2021. p. 126: "the individual case reveals a norm that not existed before-hand: *ex facto ius oritur*". See also Luhmann, Niklas. "Law as a social system." *Nw. UL Rev.*, vol. 83, 1988, p. 136.

[238] Buckland, W.W. *A Text-book of Roman Law from Augustus to Justinian*, revised by Peter Stein. Cambridge University Press, 1963. xviii-xix.

each part entered the agreement to fulfill an obligation, but for their lack of the bargain requisite, assuming that part of the process involves negotiating its terms. The system becomes a binary inside law-contracted subject or an outlaw, forbidden to enjoy the benefits of the Law's existence[239]. This progression is characterized by the gradual erosion of the traditional requirement of a bargain between parties and the increasing use of terms of acceptance to enjoy a certain right, usually a good or service.

Law is a rule-based program with a tendency for algorithmic replacement unless the system's capacity for conforming with instructions turns exceptions or invalid inputs into non-verifiable responses according to previous commands[240]. The present topic is falsified experience[241], given Law command's inability to indefinitely reproduce a pattern of experience[242]. Early Roman Law attempted to cement agreements in formularies to prevent the mismatching between lived experience and previous rules on the issues at stake.

In Comparative Law, the binary similarities and differences play a crucial role while drawing comparisons among systems, and while conducting comparative research across different jurisdictions, the available options range from harmonizing similarities to emphasizing the differences. Transposing this analysis method to classic period Roman Law,

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[239] See Zencovich, Zeno. "Smart Contract, Granular Norms and Non-Discrimination." *Algorithmic Regulation and Personalized Law*, edited by Christoph Busch and Alberto De Franceschi. Verlag C.H. Beck, 2021. p. 267: "Does it mean a law, or some piece of general provision formed by private parties? Are contractual terms binding for a non-determined number of other private parties? Are contractual terms and conditions to be considered as 'norms'(the Code Napolèon taught us that 'les conventions légalment formées tiennent lieu de loi à ceux qui les on fait'). And what about 'social norms'? Technical rules? Standards?"

[240] Hart, H. L. A. *The Concept of Law*. Oxford University Press, 1961. pp. 121-130.

[241] Or a fiction as Kelsen, Hans. "The Function of a Constitution." *Essays on Kelsen*, edited by Richard Tur and William Twining, translated by Iain Stewart, p. 117: "A fiction in this sense is characterized by its not only contradicting reality but also containing contradiction within itself."

[242] Grossi, Paolo. *Mitologie giuridiche della modernità*. Giuffrè Editore, 2007. p. 6: "*Perdita della dimensione sapienziale non vuol dire soltanto la sottrazione del diritto a un ceto di componenti, i giuristi, siano essi maestri teorici o giudici applicatori, ma la perdita del suo carattere òntico, del diritto come fisiologia della società, da scoprire e leggere nella realtà cosmica e sociale e tradurre in regole. Un costo che la visione ordinamentale attenuerebbe di parecchio, se non fosse ostacolata nella comune coscienza de un vittorioso permanere di convinzioni imperativistiche. La lezione dello storico consiste nel richiamare l'attenzione dell'odierno giurista sulla intima sapienzialità del diritto in culture diverse da quella consolidátasi nel colmo dell'età moderna nell'Europa continentale, pienamente nel diritto comune (ius commune) medievale e post-medievale, in notevole misura nella civiltà del common law."*

the birth of differentiation becomes noticeable through exceptions and defenses for perfected agreements. While *exceptio doli and pacti* remounts this early tradition, already distinguishing *exceptio doli* and frustration for force majeure[243], the process evolved to comprise subtle but consistent situations in which raising *exceptio doli* ceased satisfying the myriad of situations that could ensue and be protected by the Law.

Schulz posits that the archaic legal language of sacral laws, which predates the legal sophistication of the Republican period, was characterized by imperatives and rituals that closely mimicked sacerdotal rituals. The application of the laws was rigid and failed to account for the multitude of situations that could arise from an agreement. He provides a clear illustration of the manner in which modern German courts, guided by the historical school of legal thought, handle matters of contract law. These courts require a comprehensive understanding of the receipt of an oral declaration and adhere to the strict principle that a declaration is not considered valid if the party refuses to receive it, as evidenced by the act of ending a call or covering their ears[244]. However, the development of jurisprudence, guided by

[243] Riccobono, Salvatore. *Scritti di Diritto Romano II: Dal Diritto Romano Classico al Moderno*. Università degli Studi, 1964. pp. 370-371: "Lo strumento più energico e generale adoperato dal pretore per correggere il *ius civile* nella sua attuazione pratica fu sicuramente la *exceptio doli*. E qui intendo riferirmi a quella parte della clausola che non presuppone un dolo effettivo dell'avversario, ma bensì autorizza il giudice a considerare il valore etico della domanda dell'attore e respingerla, per quanto fondata sul *ius civile*, qualora dalla sua esecuzione potrebbero derivare effetti iniqui, non conformi al sentimento di giustizia più progredito. In questo caso, dunque, il dolo è in re ipsa; nella domanda dell'attore, che invoca la tutela del diritto. La redazione della clausola al tempo presente: *neque fiat*, racchiude appunto questo significato. Or la clausola, che noi sogliamo indicare come *exceptio doli generalis*, ebbe la sorte più propizia; poiché essa ebbe la virtù di correggere e anche di annullare nell'attuazione pratica il *ius civile,* nel momento stesso in cui l'investito di un tal diritto invocava la tutela dello Stato. E l'impedimento opposto dalla exceptio doli aveva la forza di infrangere la pretesa giudiziaria dell'avversario fondata sul ius; onde l'avversario era costretto ad evitarla, quando era possibile, col soddisfare la richiesta che gli opponeva." For how it was incorporated in the italian tradition see Di Marzo, Salvatore. *Le Basi Romanistiche del Codice Civile*. Unione Tipografico, 1950. pp. 262-263 concerning the roots of the Italian Civil code Art. 1439.

[244] Schulz, Fritz. *Principles of Roman Law*. Clarendon Press, 1936. p.29. For another relevant explanation of reception see p. 66-67: "To any one coming from the world of medieval German Law into the world of Roman law the legal world suddenly appears more definite, simpler, more comprehensible; on the other hand, the heterogeneous and complicated German law with its labyrinthine legal configurations, on the other the simplicity in greatness the limitation to a few clearly recognizable themes, of Roman law. It should not be objected that medieval German law ought only to be compared with medieval Roman law, and that Rome, in the second and first centuries B.C. and still more in the period of classical law, had already left its 'middle ages' far behind. It is certainly 'permissible' to compare phenomena taken from different stages of culture with one another, in order by the contrast to be able to recognize the phenomena themselves more clearly;

the historical school, has led to the recognition that if the other party deliberately denies receipt of a particular manifestation of intent, it can be considered as having been transmitted, as the act of avoiding receipt constitutes full disclosure of the message's content.

I.III. Contractual paths for continental and common law traditions

While dealing with the History of English Law, Maitland, and Pollock proclaimed that the Law of contracts before the Norman Conquest was rudimentary and that state of primitiveness waited centuries to be surpassed by a law of contract not perceived "as a mere supplement to the law of property."[245]. The absence of credit in the Anglo-Saxon world aligned with the Roman Empire's dissolution carried a perished Roman system that was "painfully reconstructed in the Middle Ages."[246]

According to E. Levy, the fall of the Western Empire ushered the Roman legal edifice into a state of degeneration, a vulgarized Roman Law[247]. Some features become evident from the study of Vulgar Law; the loss of distinction between contract and conveyance and

great care must then, however, be taken in drawing from such phenomena conclusions as to contrasts between the individualities of the peoples concerned."

245 *History of English Law*, vol. II, 2nd ed. Cambridge University Press, 1968. pp. 184-185.

246 Ibid. See also *History of English Law*, vol. II, 2nd ed. Cambridge University Press, 1968. pp. 184-185. See also Wigmore, John H. "Pledge-Idea a Study in Comparative Legal Ideas." *Harv. L. Rev.*, vol. 10, 1896, p. 321. On p. 332-33 he accounts for the birth of a credit system in the late Middle Ages and the changes on the pledge-idea.

247 Levy, Ernst. *West Roman Vulgar Law: The Law of Property*. American Philosophical Society, 1951. p. 240: "The disintegration of the system of *actiones* which took place in Roman vulgar law continued in the Visigothic and Burgundian codes down to a complete elimination. Even the miserable remnants which had hitherto survived, came now to disappear altogether. On the positive side of the ledger the continuity of the development is most plainly manifested in the use of the verb *vindicare* which remained popular because it had emancipated itself from its connection with judicial proceedings. The term, to be sure, was hardly employed to denote selfhelp, but occurs regularly in the colorless sense 'to claim' with which, as a rule, a judicial action is not associated. Here, too, the object of *vindicare* if often, but not exclusively, an aggregate of things such as decedent's estate. The cardinal concept *actio*, however, faded away entirely. Agere in the technical sense does not appear any more in the extant portion of CE (*Codex Euricianus*, ed. Karl Zeumer, Hannover und Leipzig, Hahn, 1902) or in the Antiqua of LV (*Lex Visigothorum*, ed. Karl Zeumer, Hannover und Leipzig, Han, 1902). Actio is found in CE, and the isolated instances in which the word occurs in the Antiqua or in LB point quite generally to the conduct of a lawsuit or the right to sue. The custom of labelling a specific right with a certain *actio* has completely vanished. Every trace of the classical system has been wiped out. An action as the request for court protection is now, as already in the vulgar law, the natural concomitant of any substantive right."

formulary procedure gave rise to *cognitio* procedure towards increased attention to substantive rights[248].

The decline in juridical understanding of Roman institutions also propitiated the construction of paths on rights and enforceability to compound legal replications resembling novel agreements and ways of holding property previously inexistent.

Nonetheless, replication tends to degrade in the copying process. A set-forth command corresponds to the self-replication instruction. However, as a copy of this initial program, reproduction tends to be detached from the source unless improvement is continuously made from one step to another through legislative influxes and adjudicatory advancement, as is the case in common law jurisdictions.

Pollock and Maitland observed the English lawyers' philosophical approach posing the following question: "*How does Law, or a law, come into being*?"[249]. For the question, they answered: "*The opening chapters of Justinian's Institutes were known. The sentences which define iustitia, iurisprudentia, ius naturale, ius genitum, ius civile, and so forth, were copied or imitated; but, any real knowledge of Roman History being still in the remote future, these sentences served as a check upon, rather than as an incentive to, rational speculation*."[250]

The shared sensation of belonging to a remote past affect jurists in both the common law and civil law traditions. As Gorla and Moccia observe, when the veil separating the two traditions is lifted, the feeling that remains is one of *déjà vu*, as both systems project their

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[248] Schulz, Fritz. *History of Roman Legal Science*, 1953, p. 50: "By the second century these forms had become stereotyped; they were few, and the development of new forms seemed impossible. But with the introduction of the formulary procedure by the *lex Aebutia* (second century) a task of unprecedented importance was laid upon the jurisconsults. It was now the business of the plaintiff to present to the magistrate (the most important was the praetor) a draft statement of claim (formula); the defendant might propose modifications of the draft, for example the insertion of a special defence (exception); the magistrate too might make his authorization of the proposed formula conditional on the plaintiff accepting certain changes in it. The settling of the formula was thus an extremely technical process, for which professional help was indispensable, since neither the parties nor the magistrate, unless by exception he happened to be a jurist himself, would possess the requisite legal knowledge."

[249] *History of English Law*, vol. II, 2nd ed. Cambridge University Press, 1968. p. 174.

[250] *History of English Law*, vol. II, 2nd ed. Cambridge University Press, 1968. p. 175.

distinctive features as unique expressions of a remote past[251]. The vision of a collective future may not be as optimistic as predicted by Helmholtz. Great Britain chose to remain insular, leaving the dream of legal harmonization for the rest of the European Union.

In the common law tradition, frustration and impossibility are recognized as defenses that may excuse a party from their contractual obligations. The case of Taylor v. Caldwell[252], established that parties may be excused from performance if the subject matter of the contract is destroyed or made impossible to perform due to an unforeseeable event. This principle was applied in the recent case of Canary Wharf Ltd. v. European Medicines Agency[253], where the High Court of England and Wales found that Brexit was an unforeseeable event that frustrated the parties' lease agreement[254].

In the civil law tradition, impossibility is recognized as a defense excusing parties from their contractual obligations. The doctrine of impossibility is closely related to the concept of force majeure[255], which refers to events outside the control of the parties that make performance impossible. The impact of the doctrine of impossibility and discharge on current contracts varies between the common law and civil law traditions. In the common law tradition, the doctrine of frustration is applied narrowly, only in cases where the event causing the frustration was unforeseeable[256]. In the civil law tradition, the doctrine of impossibility is applied more

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[251] Gorla, Gino; Moccia, Luigi. "A 'revisiting' of the comparison between 'Continental Law' and 'English Law'(16th-19th Century). *The Journal of Legal History*, vol. 2, no. 2, 1981, pp. 143-156.

[252] 1863, 3 B & S 826

[253] [2019] EWHC 327 (Ch).

[254] Kovac, Mitja; Aubrecht, Paul. "Frustration of Purpose, Brexit, the COVID-19 Pandemic and Commercial Contracts." *NJCL*, 2022, p. 1.

[255] Friedmann, Daniel, and Moshe Gelbard. "Force Majeure and Hardship under General Contract Law: A Comparative Study." *10 Int'l Bus. L.J.*, vol. 663, 1982.

[256] Dimatteo, Larry A. "Excuse: Force majeure and Hardship." Janssen, A. U., et al. 2nd ed. Hart, 2021, pp. 690-736. p. 694: "For example, currency fluctuations are seen as foreseeable events. The contractual designation of payment in a currency can be seen as an express allocation of risk, to the party obligates to pay in that currency. However, if the currency fluctuation is determined to be extraordinary then it can be argued that such a drastic change was not a foreseeable event. The determination of what type of change is considered grounds for granting an excuse will often be based upon an historical analysis of the currency rates between the currency of the contract and the payer's national currency. Again, the excuse doctrines are flexible enough to turn the ordinary into the extraordinary, but different courts and arbitral panels will have different thresholds for making this conversion." See also the comparative study Dimatteo, L. A, Infantino M., Wang, J., and

broadly and may be invoked in cases where the event causing the impossibility was foreseeable but outside the parties' control.

The importance of situating legal traditions in the study of exceptions concerns the strict treatment of liability for non-performance in the common law tradition. As asserted in Stojlar, the dilemma in contract history concerns "*one we encountered all over the performatory field. Two opposing principles were struggling for supremacy: a 'strict' principle under which the parties were confined to the contractual rights and duties expressly specified in the contract itself, and a second (which with some apology to the word we may again call a) 'synallagmatic' principle more concerned with the adjustment of a contract according to the parties' actual exchange position when a contract for any reason collapsed*."[257]

From Stojlar analysis, a balance of opposing forces emerges that will permeate the evaluation of what principle to favor depending on the legal tradition subjected to scrutiny. From one side, the importance of the sanctity of contractual transactions, assuming that each party calculated the involved risks in the transaction, is why what is to be favored is the parties' autonomy under the *pacta sunt servanda* principle.

On the other hand, in the *rebus sic stantibus* clause regarding future promises, the promise for a future act presupposes maintaining equilibrium and the physical possibility of fulfilling the obligation on the grounds of feasibility to perform. The strict principle prioritizes the *pacta sunt servanda* over verifying the permanence of the conditions allowing the parties to perform in the first place. The treatment over impossibility separates the continental and the common law tradition, requiring a deep incursion into the past to learn why specific performance is so pervasive in the continental tradition.

Monaco, P. "Once More Unto the Breach: A Comparative Analysis of the Meaning of Breach in Contract Law." *Transnat'l L. & Contemp. Probs.*, vol. 31, 2021, p. 33.

[257] *A History of Contract at common law*, 1975, p. 197.

In contrast, damages are the remedy for breaches of the common law as a manifestation of courts refusing to rewrite contractual terms[258]. Damages in the common law are the natural consequence of contractual breaches since specific performance implies a solution escaping parties' agreements of outcomes from the breach unless specific performance was initially present as the way of solving a dispute arising from the breach.

The correlation between the uncommon nature of awarding specific performance in common law courts and the avoidance of such awards is a subject of critical examination among legal scholars. The common law court's reluctance to provide exits for frustration is viewed as a reflection of the court's limited role in interfering with private parties' agreements and its reluctance to revise contractual terms. This distinctive approach to addressing breaches and frustration in contracts is a source of contrast with other legal traditions and presents challenges for the international contractual framework, as well as competition for the preferred system and the legal tradition that seeks to attain global prestige.

The resolution of contractual disputes within the purview of the judicial system presents a problem of lesser magnitude. However, events such as wars and massive disruptions that impact a broad range of relationships challenge the law to enter uncharted territory where no limits are recognized, preventing any one jurisdiction from prevailing over the others. This highlights the limitations and complexities of the legal system and calls for a critical examination of its potential for growth in responding to transnational events that impact international relationships[259].

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[258] Eisenberg, Theodore; Miller, Geoffrey P. "Damages versus specific performance: lessons from commercial contracts." *Journal of Empirical Legal Studies*, vol. 12, no. 1, 2015, pp. 29-69. The authors conducted an empirical study evaluating the most sophisticated contracts to find that a significant part still prefers courts awarding damages and not specific performance in case of breach.

[259] A valuable distinction of *jus singulare* and *ius commune* in Roman Law is fundamental in cases of war because it helps to clarify the variety of legal status unfolding in times of conflict. See Cogliolo, Pietro. "Legislazione di Guerra nel Diritto Civile e Commerciale con una parte speciale sopra la colpa, i danni, la forza maggiore." *Raccolta completa di tutti i decreti-legge in rapporto al Diritto Privato*, 2nd ed. Unione Tipografico-Editrice Torinese, 1917. p. 95: "Nessuno ha mai dubitato che il diritto romano rappresenta anche dal punto di vista dell'intrinseco ordinamento giuridico un'opera secolare che fu d'insegnamento ai popoli che vennero poi, e che merita di esserlo ancora. Quel diritto aveva creato non per lavorio mentale dei giuristi, ma come effetto

The doctrines of frustration and impossibility also play an essential role in the different approaches to specific performance and damages in these two legal traditions. In the common law tradition, the doctrine of frustration allows a party to be excused from performing a contract when an unforeseen event makes performance impossible or fundamentally changes the nature of the contract. When this happens, the non-breaching party may be entitled to damages for any losses incurred due to the breach, but specific performance is generally unavailable[260].

The doctrine of impossibility in the continental legal tradition is similar to the doctrine of frustration in the common law, but it is applied more narrowly. In many continental legal systems, the doctrine of impossibility only applies when the contractual obligation has become objectively impossible to perform, rather than when it has become more difficult or expensive. Furthermore, even in cases of impossibility, specific performance may still be required in some circumstances.

The significance of the German BGB § 275 is demonstrated by the court's holding that specific performance was required in cases of impossibility, as long as the obligation was to deliver a unique item. (See BGB § 275, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* [BGHZ] 44, 124 (1965).) In contrast, the English case of Krell v. Henry held that specific performance was unavailable when an unforeseen event made performance impossible, and damages were awarded instead[261].

These different approaches to specific performance, damages, and the doctrines of frustration and impossibility in the continental and common law traditions reflect deeper philosophical and cultural differences between the two legal systems. The continental tradition

storico dell'evoluzione giuridica la distinzione tra *jus commune* e *jus singulare*, dei quali diritti, malgrado le molte dispute che si fanno in dottrina per precisarne i concetti, può darsi questa idea fondamentale, che il diritto comune è quello che contiene una norma generale, mentre il diritto singolare è quello che, pur regolando un numero grande di casi, contiene una norma che è una eccezione di fronte alla prima."

[260] Amongst the most relevant studies in this field one finds Fuller, Lon Luvois; Perdue, William R. "The reliance interest in contract damages: 2." *The Yale Law Journal*, vol. 46, no. 3, 1937, pp. 373-420 in two installments.

[261] See Krell v. Henry, [1903] 2 K.B. 740

views contracts as a social and moral obligation that must be upheld to maintain good faith and promote cooperation between parties, while the common law emphasizes individual rights and the need for clear rules and protections of property entitlements[262].

The sanctity of contracts refers to the principle that agreements between parties should be honored and upheld. This principle is rooted in the belief that contracts are a cornerstone of economic and social stability, and that fulfilling contractual obligations is essential for maintaining trust and cooperation in society.

However, the principle of the sanctity of contracts is sometimes in tension with the reality of changing circumstances. Contracts are often entered into in conditions of uncertainty, and unforeseeable events may arise that make performance of the contract impossible or impracticable. In these cases, the principle of the sanctity of contracts may come into conflict with the need to accommodate changing circumstances and to find a fair and just solution for the parties involved.

Different legal traditions have approached this tension between the sanctity of contracts and the need to accommodate changing circumstances in different ways. For example, in the continental legal tradition, the doctrine of impossibility is often narrowly applied and specific performance may still be required in some circumstances. On the other hand, in the common law tradition, the doctrine of frustration is more broadly applied and specific performance may be excused in cases where performance has become impossible.

The resolution of this tension between the sanctity of contracts and the need to accommodate changing circumstances is an ongoing challenge in legal systems around the

[262] Our modern law inverted the discussion poles because it made breach a sin while admitting multiple situations in which parties are exempted from their promises. It also made sin the exception from which a significant part of the substantive law derives. See Gordley, James. "Good Faith in the Medieval *Ius Commune*." *Good Faith in European Contract Law*, edited by Reinhard Zimmermann and Simon Whittaker. Cambridge University Press, 2000, pp. 99-100: "Moreover, the Canon lawyers did not say that every agreement was enforceable even in Canon law. As Astuti notes, they said little about the matter because, unlike the civilians, their prime concern was not whether an agreement was actionable but whether breach was a sin. As late as the fourteenth century, Baldus could still claim that the Roman distinction between contracts consensus and re was part of Canon Law.

world, and it requires a delicate balance between protecting contractual obligations and ensuring fairness and justice for the parties involved.

Part of the scholarship traces the path of diversity in approaching contractual issues on the legal origins of both systems, enumerating how a divergent context conferred variety between the systems. However, compelling reasons are given for sustaining the different treatment on approaching the sanctity of contract and the like arising from the state's role while dealing with contractual realities. Whether the decision is oriented on pursuing contractual legal origins or the operative effects when confronting state intervention in a given legal system[263], the result will be a nitid distinction on how a contract is written and adjudicated by the courts. Even though contract law is currently placed as part of the substantive laws of a given system, in the past, the boundaries were not yet defined, requiring an assessment of the available remedies when contractual breaches occurred[264].

The following query on this thread is whether drafting contracts and proposing available remedies differ because of state intervention or how states intervene constitutes part of the History itself. Ultimately, courts and jurists are confronted with concise contracts supported by extensive legislation or high contractual costs arrangements to exhaust the subject matter under negotiation. In any event, if exceptional circumstances do appear, all edifice collapse, and the solution to the new problems will be consolidated under a novel theory.

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[263] See Pargendler, Mariana. "The role of the state in contract law: The common-civil law divide." *Yale J. Int'l L.*, vol. 43, 2018, p. 143.

[264] Atiyah, P. S. *Essays on Contract*. Clarendon University Press, 1988. Professor Atiyah in Fuller and the theory of contract demonstrates how classic contractual law was reticent while dealing to policies to be addresses through contractual institutions, exposing how remedies were contradictory perceived by scholars willing to embrace liberalism and the implications of judicial contractual adjudication. In this passage the Atiyah's reasoning elucidated the contradictions of this theory by explaining fuller reasoning, p. 77: "Like many, indeed nearly all, liberal theorists, Fuller saw contract exclusively in terms of its facilitative function. He saw contract as an institution which enables people to plan their future relationships. Despite the importance Fuller attached to remedies in the traditional narrow contractual sense, his writing demonstrates little recognition that contract might have a secondary or 'remedial' refers to the function a court exercises when it imposes on the parties a solution to a problem that goes beyond the natural or logical implications of the parties' own ordering. In the traditional and narrower sense, 'remedies' for breach of contract were thought to involve no interventionist action by the courts; a remedy by way of damages was merely the logical corollary of wrongful breach.

The events leading to the introduction of frustration doctrines differ depending on the juridical traditions or the juridical order in which the subject is discussed, including the framework provided by International Law[265].

Additionally, regardless of the jurisdiction in which the remedies were conceived, the time in which those remedies were introduced affects the extension of the solution courts will find. Whereas Acts of God were already known and deployed before more refined doctrines were introduced, or the adoption of the *théorie de l'imprévision* allows the judges to rewrite a contract according to legislative mandates[266], and the force of previous decisions, an urged convergence of the binary is needed to harmonize the multitude of solutions under diverse legal systems. Fiction functions when they are contained in a legal universe[267]. Once they escape, their sense starts to degrade.

The role of courts of Equity in England for remediating unfulfilled promises prolonged the adoption of unforeseeable circumstances in the common law courts as a venue to mitigate injustices of enforcing contracts that no longer corresponded with the values transacted, as it happened in the shift from *Paradine v. Jane* to *Taylor v. Caldwell*[268], requiring centuries to evolve into recognizing implied terms as grounds for courts' intromission in contractual transactions. Impossibility in common does not lead to obligation's discharge, subsisting the damages awarded to the party who made the impossible promise.[269]

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[265] See Mckendrick, Ewan. “Frustration and Force Majeure - their relationship and comparative assessment.” *Force Majeure and Frustration of Contract*, edited by Ewan McKendrick. LLP, 1991, p. 27.

[266] Palmer, Vernon Valentine. "Excused Performances: Force Majeure, Impracticability, and Frustration of Contracts." *The American Journal of Comparative Law* 70. Supplement_1 (2022): i70-i88.

[267] Maine, Henry Sumner. "Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas. 1861." *New York: Dorset*, 1986, p. 26: “But I now employ the expression ‘Legal Fiction’ to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman *Responsa Prudentum* as resting on fictions. Both these examples will be examined presently. The fact is in both cases that the law has been wholly changed; the fiction is that it remains as it always was.

[268] 122 Eng. Rep. 309 Q.B. 1863.

[269] Trietel, Guenter. *Frustration and Force Majeure*. Thomson Sweet & Maxwell, 2014, 16-008, p. 642 and also 1-002, 2-009, 2014.

As extensively discussed by Trietel, *Jane v. Paradine* [270]. established two propositions, distinguishing duties created by the law and the parties. The second situation is when a party who made a promise is liable under the doctrine of absolute contracts. However, since *Taylor v. Caldwell*, the discharge doctrine has been admitted to solving bilateral contractual disputes.

Damages constituted the relief sought in the common law court from trespass actions[271], and the rigidity of the forms of actions coincided with the remedies obtained before the common law courts. To solve that problem, Equity accommodated a broader range of reliefs on equitable remedies.

Another aspect relevant for understanding frustration and impossibility, and therefore exceptions, aside from the evolution of the forms of action under the common law, concern the judiciary's role in the civil law tradition. As Dawson alludes in the Oracles of the Law, judges no longer chew on laurel leaves to access a mysterious truth hidden from the public[272]. However, in the U.S. model, the name of every justice is in the mouth of the most uninformed citizen. That aspect can be nothing but the ancient influence following the Norman conquest in England, where local courts were incumbent to have proximity to the litigated cases and witnesses, collecting evidence from locals, deciding the case in jury trials formed within the community, leaving the task of forming opinions for the higher ranks of the profession in a handful of kings' appointed judges building the core of case law[273].

In contrast, almost simultaneously with that process unfolding in the English tradition, the civil law development relied more on seeking prestige in rediscovered Justinian code in articulation to the canonical Law. Even though *ius commune* was present and spreading in the continent, it was gradually substituted by sovereign authority legislation. That tendency

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[270] Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647) and Trietel, Guenter. *Frustration and Force Majeure*. Thomson Sweet & Maxwell, 2014, 1-007, 2-001-0016, 2-020-2-034.

[271] Mattei, Ugo. *The common law model*, p. 15

[272] Dawson, John P. *The Oracles of the law*. University of Michigan Law School, 1968, vi.

[273] Another historical reference from Dawson in Dawson, John P. *A History of Lay Judges*. Harvard University Press, 1960, p. 118.

proceeded, and when the old regime collapsed, the inaugurated era coincided with enacting codes that entrusted a command independent from judicial interpretation. This feature denotes the preference of statutes and legislation over parties' freedom and exceptional judicial adjudication[274].

Consequently, the advantages and disadvantages of a civil or a common law tradition cannot be proclaimed as the adaptability of a given legal system to the market[275]. It is a reversed relationship in which the historical understanding of the consecutive political power transfers defined the juridical order's conformation. In the ancient French regime, judges were part of the nobility and should not detain power unaccountable to legislation[276]. The premise is that the courts require legislation to reproduce the command of political power holders is a manifestation of the past.

Whereas in the Common Law, even if the higher courts judges came from the higher ranks of sovereign's circles, the seeds were grounded in the local[277]. The notion is so pervasive and entrenched in American society that citizens perceive the jury trial institution as an accomplishment of the citizenry. That fact alone does not entrench the mode in which contracts

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[274] For the role of the judges revising frustrated contracts Dawson, John P. "Judicial revision of frustrated contracts: The United States." *BUL Rev.*, vol. 64, 1984, p. 1.

[275] Berkowitz, Daniel; Pistor, Katharina; Richard, Jean-Francois. "Economic development, legality, and the transplant effect." *European economic review*, vol. 47, no. 1, 2003, pp. 165-195. The paper's empirical analysis has flaws. The use of numeric standards for comparing systems' compliance with the rule of law and respect for property rights will ultimately depict the underlying circumstances insufficiently. It presupposes contextual backwardness on the receiving jurisdiction, ignoring that market forces conduct different legal systems to operate mechanisms of production and extraction according to a geopolitical role of influence. Therefore, the problem does not reside in the legal system but instead in how to impose devices of spoliation. See Mattei, Ugo; Nader, Laura. *Plunder: When the rule of Law is illegal*, p. 10. For a later partial revision of the previous findings Pistor, Katharina. *The Code of capital: how the law creates wealth and inequality*. Princeton University Press, 2019, p. 30. See also Pistor, Katharina. "Standardization of Law and Its Effect on Developing Econonomies." *Am. J. Comp. L.*, vol. 50, 2002, p. 97. See also Coase, Ronald H. *The firm, the Market and the Law*. University of Chicago Press, 1988, p. 159: A fundamental point is whether it is reasonable to assume, as I did, that, when there are zero transaction costs, negotiations will lead to an agreement which maximizes wealth."

[276] That tendency led to a vast literature to the role of the judge under French Law. See Garapon, Antoine. *Le gardien des promesses: le juge et la démocratie*, preface by Paul Ricoeur. Editions Odile Jacob, 1996. p. 12. Dawson, John P. *The Oracles of the Law*. William S. Hein & Co, 1986, p. 416. Lasser, Mitchel de S.-O.-L'E. *Judicial Deliberations: a Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford University Press, p. 166. Belaid, Sadok. *Essai sur le Pouvoir createur et normative du juge*. Librairie Generale de Droit et de Jurisprudence, 1974, p. 284.

[277] Dawson, John P. *A History of lay judges*. Harvard University press, 1960, p. 228.

will be drafted. Common law courts' deference to private autonomy permeates the living Law on matters surpassing contractual obligations. It functions as evidence of a pattern crafted in the past, the result of a centennial effort to bring cases to court not remediated by a writ.

The remainder of the assumpsit of the plaintiff's duty to conform with very strict pleadings reflects how contractual relations would play out, allowing for more accommodation to parties' clauses instead of attending an unfitted remedy. As Oliver Wendel Holmes already attested, parties are left with damages for breaches, which does not add much to the court's adjudicatory role[278].

Furthermore, the common law system relied heavily on the privity of contract, which meant that only parties to a contract could enforce its terms. This approach meant that third parties could not enforce a contract, even if they had a close relationship with one of the contracting parties. This approach, however, did not always provide an adequate legal remedy for parties who suffered loss or damage because of a breach of contract.

The doctrine of assumpsit emerged as a response to this problem. "*Assumpsi*t" comes from the Latin phrase "*he undertook*," reflecting the idea that a party has made an undertaking or promise. The action of assumpsit allowed a party to recover damages for breach of a promise or undertaking, even if they were not a party to the original contract.[279] This development

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[278] Holmes, Oliver Wendell. "The path of the law." *Harvard Law Review*, vol. 110, no. 5, 1997, pp. 991-1009. p. 995: "Nowhere us the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else." Fuller conceived that breaches should be treated with a goal of deterring parties from breaching a contract. See Fuller, Lon; Kairys, David. *The Role of Contract, in The principles of social order: selected essays of Lon L. Fuller*. Duke University Press, 1981.

[279] Corbin, Arthur L. "Waiver of Tort and Suit in Assumpsit." *The Yale Law Journal*, vol. 19, no. 4, 1910, pp. 221-246. Ames, James Barr. "The history of assumpsit. I. Express Assumpsit." *Harvard Law Review*, 1888, pp. 1-19 in two installments for express and implied assumpsit. Ames examines the development of the legal concept of express assumpsit in English common law, which involves a defendant who has voluntarily assumed an obligation through a promise or representation. The idea that the defendant assumed an obligation through their promise was central to the growth of express assumpsit as a legal remedy, enabling individuals to enforce non-written promises in court. Ames details the various forms of express assumpsit that emerged, including simple, indebitatus, and specialty assumpsit, and how they evolved in response to changing social, economic, and legal conditions.

marked a significant shift in the common law system's approach to contract law, enabling a more flexible and distinct approach to remedies for breach of contract.

The case of Cutter v. Powell (1795) [280] played a significant role in developing the doctrine of assumpsit in the common law[281]. In Cutter, the defendant engaged the plaintiff's husband to work on his ship. The plaintiff's husband died during the voyage, and the plaintiff sued the defendant for wages owed to her husband under the contract. The court held that the plaintiff could not recover under the original contract because she was not a party. However, the court allowed the plaintiff to recover under an implied promise, stating that "*wherever one person has paid money to another, which the latter has agreed to apply to a particular purpose, and he does not apply it to that purpose, an assumpsit will lie at the suit of the person who paid the money*."

I.IV. Broken promises and the overture for exceptions

The current topic has drawn considerable attention from prominent scholars. Charles Fried, Patrick Atiyah, and Joseph Raz offered a perspective[282], regardless of its capacity to free the Law from moral constraints and the flaws of Law and Economics, exited the circularity offered by Harvard's Dean Langdell in his cryptic consideration definition of "*the consideration of a promise is the thing given or done by the promisee in exchange for the promise*".[283]

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[281] Stoljar, Samuel J. "The Great Case of Cutter v. Powell." *Can. B. Rev.*, vol. 34, 1956, p. 288. As stated by Stojlar, the cases present a microcosmos about the many theories surrounding contractual arrangements. If for nothing, the cases should be described as the man who died for no reason since if work payment was not apportionable, and if the sailor was never to get in the boat, perhaps he was never to die. For a reconstruction of the mentality of that time see Barton, J. L. "Contract and quantum meruit: the antecedents of Cutter v. Powell." *The Journal of Legal History*, vol. 8, no. 1, 1987, pp. 48-63.

[282] Atiyah, Patrick. *Promises, morals and Law*. Clarendon Press, 1981 reprint, pp. 138-139. See also Raz, Joseph. "Is There a Reason to Keep Promises?" *Columbia Public Law Research Paper*, vol. 12, no. 320, 2012, pp. 2014-2015.

[283] Apud Bronaigh. A secret paradox in the Common Law, Langdell Summary of the Law of contract.

The philosophical inquiries concerning promises and morality attempt to provide a definition that stands above morals, but it is enforceable by the Law. However, as Charles Fried pointed out, two main reasons prevent promises from detaching "the moral force behind contract as promise"[284]. Mistake and frustration harm consent since what parties promised does not correspond to what they mentally agreed. Considering the lack of information regarding the unfolding future, parties did not assess the risks involved in the promise to perform in a certain way. The twofold constitutes what Charles Fried defines as the gap in classical theory since the sanctity of contracts prevents scholarship from conceding the defective nature of exercising autonomy to regulate private behavior.

However, if one distances themselves from the problem of consent to the problem of meaning, mistake leaves the realm of Law to become a philosophical concern. Wittgenstein's "*beetle*" analogy demonstrated that the inner personal sensation is irrelevant to every person's box's shared public meaning[285].

The same applies to contractual relations. A promise juridically enforced will not assess parties' mental processes for entering an agreement. The remnants are the exteriorizations that evidence governs[286], including hearing the parties involved, natural or juridical persons.

The search for a universal contract principle is yet to be completed since the underlying conditions to achieve such universality depend on philosophical grounds concerning language,

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[284] Fried, Charles. *Contract as Promise*, 1981, p. 57.

[285] Wittgenstein, Ludwig. *Philosophical Investigations*. Basil Blackwell, 1968, § 293. "If I say of myself that it is only from my own case that I know what the word 'pain' means — must I not say the same of other people too? And how can I generalize the 'one' case so irresponsibly? Now someone tells me that he knows what pain is only form his own case! – Suppose everyone had a box with something in it: we call it a 'beetle'. No one can look into anyone's else's box, and everyone says 'he' knows what a beetle is only by looking at 'his' beetle. – Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. – But suppose the word 'beetle' had a use in these people's language? – If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a 'something': for the box might even be empty. – No, one can 'divide through' by the thing in the box; it cancels out, whatever it is. That is to say: if we construe the grammar of the expression of sensation on the model of 'object and designation' the object drops out of consideration as irrelevant." (p. 100).

[286] Perillo, Joseph M. "The origins of the objective theory of contract formation and interpretation." *Fordham L. Rev.*, vol. 69, 2000, p. 427.

the mind, and failures to predict future events. For scholars to assert a conceptual framework for allowing breaches of promises occasionally under Acts of God[287], others duress, violation of good faith duties, and other implied terms assumptions, create a scenario in which normative framework disruptions shake the very premises of contractual relationships: autonomy, sanctity, state absence to interfere.

While the study of sacrifice provided the sources for contractual transactions, the cursed human nature determines when courts should adjudicate private enterprise before unforeseen circumstances. Parties interact under the belief that there is an advantage that the other party ignores or that at least by renouncing part of its freedom or assets, the sacrifice is not taken under deception or harsh consequences for events both parties could not predict and assume the risks of it. One detail constantly ignored by the Law and Economics lenses is that parties are more oriented on unconsciousness, bias, and intended irrational modes than one might imagine. The Foucauldian homo economicus rationalizing transactions based on cost-benefit analysis is less likely to occur than the Shyllock willing to have his 'pound' of flesh. It is more likely to encounter a person willing to give their beloved ones for sacrifices, hostages, public ruin, and the like[288].

Using Gadner's allusion[289], a promise is a leap of faith into the contract. As Charles Fried perceives, "*the freedom to bind oneself contractually to a future disposition is a strikingly*

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[287] Chitty, Joseph. *Chitty on Contracts*, 26th ed., vol. 1, general editor A. G. Guest. Sweet & Maxwell Limited, 1989. pp. 1035-1045. In *Chitty on Contracts*, 1043: " It has rightly been observed that the concept of force majeure in English Law is wider than that of 'Act of God' or vis major, as these latter expressions appear to denote events due to natural causes, without any human intervention. In Lebeaupin v. Crispon & Co. ([1920], 2 K. B. 714) McCardie J. reviewed the previous authorities on force majeure, and it now seems that war, strikes, legislative or administrative interference, for example, an embargo, the refusal of a license, or seizure, abnormal storm or tempest, flooding which inhibits shipment from river ports, interruption of the supply by rail of raw material, and even the accidental breakdown of machinery can amount to force majeure, but not 'bad weather, football matched or a funeral', a failure of performance due to the provision of insufficient resources or to a miscalculation."

[288] See Nelson, Benjamin. *The idea of Usury: from tribal Brotherhood to Universal Otherhood*, 2nd ed. Chicago University Press, 1969. p. 86.

[289] Gardner, John. *Law as a Leap of faith: essay on Law in General*. Oxford University Press, pp. 12.

example of this freedom," adding that the role of promises certainly expanded if compared to Ciceco, Grotius, and Pufendorf[290].

A promise is not an utterance if bestowed legal validation. A promise gains legal status as it accomplishes the rituals the Law assigns. In the concise definition provided by Martin Hogg[291], "*a promise is a statement by which one person commits to some future beneficial performance, or the beneficial withholding of a performance, in favour of another person*."[292]

Among the aspects worth noting on the elements composing a promise, one finds the speech act nature once lucubration seats in states of mind not yet born in the material world through speech. With the pronounced words, a thought gained the speech act as Genesis described God's creation of the world: "*And God said, Let there be light: and there was light*." (Gen. 1:3). The second passage for a promise is the commitment that one performs themselves the act uttered. The person who promises also must commit to fulfilling the promise because if the promisor from the beginning never intended to accomplish the promised action, the result is a void promise. Thirdly, promises presuppose the future since past acts denote a confession, and the present does not require speech to unfold. On the other hand, a promise to oneself is a vow. Even Saint Augustine excused the breach of a promise if the promise was to do something unlawful or the circumstances had changed[293].

Approaching the grueling development of the action of assumpsit, A. W. B. Simpson makes a blatant remark on the nature of exceptions in that particular field:

> *"But like all legal doctrines it was continually in danger of erosion; whilst it could never be ignored, it could be and was attacked, distinguished, reformulated, and by less timorous exceptions to the doctrine came to be recognized by the courts. Eventually the exception became dominant, so that it began to seem*

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[290] Fried, *Contract as promise*, p 21.

[291] Hogg, Martin. *Promises and Contract Law*. Cambridge University Press, p. 6. The elements composing a promise are extracted from the book since it provided a comprehensive overview of the implications of studying the topic.

[292] Also, Rawls, *A Theory of Justice*, p. 52.

[293] Hogg, Martin. *Promises and Contract Law*. Cambridge University Press, pp. 75-76 and Aquinas, *Summa Theologica*, II-II, Q. 110 art. 3.

> *more comprehensible to reverse the rule and to say that assumpsit did lie for nonfeasance, and to explain the situations in which the action did not lie as exceptions to this new general principle*."[294]

He examined the gradual replacement of actions of covenant by actions on assumpsit, substitution completed when English courts started admitting assumpsit for nonfeasance and not only for misfeasance. After the Judicature Acts, the action of assumpsit lost its reason for existence. Although the action does not have a procedural use, it offers profound evidence of how change is a complicated subject when the Law offers the comfort of certainty as one of its core features. Regardless of how unhurriedly legal changes can be, legal commands cannot band reality to its aspirations.

Promises should be kept, but exceptions need to find accommodation. One example from the Americanization of the Common Law illustrates how Massachusetts received the breaches in the former order. The unsatisfied debtors claimed a broader expansion of access to justice, so they would not be harmed by the judicial procedures for collecting debts: "*Except in actions to try title to land, the common law forms of action were in full vigor in the prerevolutionary period*."[295]

In his work "Justice in Transactions," Peter Benson reinforces the skepticism among scholars regarding the relationship between contractual fairness and the underlying principles of contractual obligation[296].The tension between the sanctity of contracts and the need to remedy breaches, particularly when instances of unfairness arise, continues to pose a

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[294] Simpson, A. W. *A History of the Common Law of Contract: the rise of the Action of Assumpsit*. Clarendon Press, 1975. pp. 248-249: "So long as the courts maintained the rule that assumpsit would not lie for a pure nonfeasance, it was impossible for litigants to use assumpsit as a complete substitute for the action of covenant, and thereby evade the rule which generally prevented litigation in the common law courts on agreements which were not made under seal. The nonfeasance doctrine, as we have seen, appeared in the law in 1400, and for well over a century it exercised a powerful restraining influence over the development of assumpsit".

[295] Nelson, William E. *Americanization of the Common Law: the impact of legal change on Massachusetts Society 1760-183*. The University of Georgia Press, 1994. pp. 5-69-72.

[296] Benson, Peter. *Justice in Transactions: a theory of contract law*. The Belknap Press of Harvard University Press, p. 165: "*many if not most scholars view doctrines of contractual fairness as exceptions to, or even as in tension with, the values and principles that underpin the normative basis of contractual obligation*."

significant challenge to scholars in this field[297]. The fact that common law remedies for contractual dissatisfaction are limited to damages only exacerbates the philosophical divide on the appropriate role of courts in interfering with the choices made by parties in their agreements.

When parties enter a contractual relationship, they intend to perform the assumed obligations since no government or other authorities impose on them the duty to engage in transactions[298]. Along with developing this topic, it will surface cases in which parties abdicate fundamental freedoms through contractual dealings. For that reason, there is a mandate for the State to intervene, as it happens in labor relations in which the worker is putting to the disposition of the employer substantial of their lives. Parties' abdication of their time without due compensation justifies why wages should correspond minimally to basic living standards. For that reason, the State should ensure through regulation that the exchange is fair and that the vulnerable party is not subjugated to terms outside their will[299].

Excluding contractual relations that are regulated by the state, such as those found in consumer law, securities law, insurance law, and financial agreements with corporations, where the state sets basic standards to prevent the exploitation of weaker parties by those in a position of power, agreements in the common law are considered binding once certain basic

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[297] Waddams, Stephen. *Santictity of Contracts in a secular age: equity, fairness and enrichment*. Cambridge University Press, 2019, p. 99: "Neither perspective can justify an unqualified sanctity, for there are many instances in which the supposed benefits of absolute enforcement of contractual obligations have been outweighed by considerations of justice between the parties or by considerations of public policy. In the context of electronic contracts there is every reason for the courts to remind themselves of what Lord Denning called 'the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused."

[298] Yates, David. *Exclusion Clauses in Contracts*. Sweet & Maxwell, 1978. p. 9: "Businessmen utilize legal processes, notably the law of contracts, to plan certain aspects of their commercial dealings. Summers has characterized this as 'the grievance remedial technique'. The grievance remedial technique is the resort to legal remedies when the commercial relationship breaks down. So, this would include repudiation of the contract, actions for damages, arbitrations and out-of-court settlements. The private arranging technique involves the use of the contract by the parties to regulate their relationship and plan what is to happen in the future."

[299] Kens, Paul. *Lochner v. New York: Economic Regulation on Trial*. Landmark Law Cases & American, 1998, p. 194. Justices Harlan and Holmes were strong dissenting voices in Lochner's case, rebuking the arguments for *laissez-faire* and defending what would later become the realist view that judges have a rule on shaping public policy. Lochner would be overturned only with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

requirements are met. The terms of the contract dictate the obligations of the parties, which are voluntarily agreed upon. The landmark case of *Taylor v. Caldwell* in the common law installed a *transgressio*n with the introduction of the concept of implied terms, a departure from the traditional understanding of contract law. This departure has been described by Professor Catharine MacMillan as "the exception becoming the rule." [300]

Underlying the paradigmatic case of *Taylor v. Caldwell*, a noticeable moment in History shifted the engines of contractual Law. Ibbetson's account attributed to Taylor v. Caldwell the power to enable "*the nineteenth-century courts to develop rules of law behind a façade of party intention*."[301]. The case dealt with the lease of a garden theater in London for promenade concerts, a fashionable enterprise for a society with rising tastes and standards of living, willing to pay a reasonable fair for the amusement of the time. The theater burned down before the concert, and when the plaintiffs sought a breach of agreement, the court held that the implied condition of the property's existence prevented liability. The case illustrated an understanding of the parties' inability to predict all events that could unfold from a contractual breach.

Moreover, if parties cannot reduce their predictions into written words or without further communicating unforeseen events to the other party, one would rely on the assumption stated in the dialogue between the Doctor of Divinity and the Student that "*the intent inward in the heart, man's law cannot judge*."[302]

The decline of nineteenth-century will theory happened on uneven grounds. The recognition of the binding force of agreements was followed by the recognition of procedural improprieties of parties taking advantage of the weaker[303]. Broken promises not enforced by Courts paved the way for the expansion of exceptions.

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[300] Macmillan, Catharine. "Taylor v. Caldwell." *Landmark Cases in the Law of Contract*, edited by Charles Mitchell and Paul Mitchell. Hart Publishing, 2008, p. 202.
[301] Ibbetson, *A Historical Introduction to the Law of Obligations*, p. 224
[302] Perillo, Joseph M. "The origins of the objective theory of contract formation and interpretation." *Fordham L. Rev.*, vol. 69, 2000, p. 427.
[303] pp. 249 Ibbetson.

The sanctity of contracts was no longer the bulwark of courts' opinions. In a chapter entitled "*exceptions to 'absolute' promises"* McElroy refers to Blackburn's turning point on the recognized rule before Caldwell to further make an inverse interpretation in the opposite direction[304]. There Lord Blackburn recognizes as a first passage for the shift: "*Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly bothersome or even impossible*.[305]" Enunciating the principle that would become the implied terms rule:

> *"The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance...that excuse is by law implied because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."[306]*

U.S. Restatement of Contracts provides the following concept for a contract:

> *"A contract is a promise or a set of promises for the breach of which the Law gives a remedy, or the performance of which the Law in some way recognizes as a duty."[307]*

On the other hand, article 1101[308]of the Napoleon Code provide the following: "*Le contrat est un accord de volontés entre deux ou plusieurs personnes destiné à créer, modifier, transmettre ou éteindre des obligations*."

The clashes between the two visions are more nuanced than one might accept. The French doctrine of the late 19th century regarding the formation of contracts provides that

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304 McElroy, Roy. *Impossibility of performance: a treatise on the law of supervening impossibility of performance of contract, failure of consideration*, edited with additional chapters by Glanville L. Williams. Cambridge University Press, 1941, pp. 22-23.
305 McElroy p. 22.
306 McElroy p. 23.
307 Restatement (Second) of Contracts § 1 (1981).
308 Modified by the Ordonnance n°2016-131 du 10 février 2016 - art. 2.

bilateral (or multi-lateral) agreement is considered an essential requirement for forming a contract, and a simple, unaccepted promise would not have any binding character. This doctrine was strongly defended against both the legal rule of the opposite sign[309], and against a practice that increasingly allowed for the formation of a contract through the silence of the recipient of an offer made in their exclusive interest.

For example, Demolombe excluded the possibility of considering the offeree's silence as tacit consent, as there would still need to be an expression of adhesion by the offeree. However, this rule would have an exception when the offer was made in the exclusive interest of the offeree, and there was no reason for them to refuse it. In that regard, the author sustains that this could be a possible explanation for article 1108 of the Napoleonic Code, which only requires the consent of the party who is bound. Similarly, Baudry-Lacantinerie and Barde exclude the necessity of acceptance by the offeree in exceptional cases when the offeree has no reason to refuse the offer, as the offer is of such a nature that it does not require a response. Guarneri notes that this discontinuity between the dogma and the concrete rule will continue to accompany the treatment of this issue in French doctrine[310].

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[309] To cite an example the requirement under article 1108 of the Napoleonic Code that a contract requires "the consent of the party who is bound".

[310] Guarneri, Attilio. *Diritti Reali e Diritti di Credito: valore attuale di una distinzione*. CEDAM (Casa Editrice Dott. Antonio Milani), 1979. pp. 63-64: "Come è noto, la dottrina francese del secolo scorso ha edificato il dogma della formazione bilaterale (o plurilaterale) del contratto, per cui la bilateralità (o plurilateralità) sarebbe requisito così essenziale di ogni contratto che la semplice promessa non accettata non avrebbe alcun carattere vincolante. Tale dogma è stato pervicacemente difeso tanto contro la regola legale di opposto segno, che prevede all'art. 1108 code Nap. tra i requisiti del contratto 'le consentement de la partie qui s'oblige', quanto contro una prassi che ammette, invece, con sempre maggiore ampiezza che il contratto possa formarsi anche con il silenzio tenuto dal destinatario di un'offerta fatta nel suo interesse esclusivo: così, ad esempio, Demolombe esclude in linea di principio che il silenzio dell'oblato possa essere considerato come un consenso tacito, perché occorrebbe pur sempre una dichiarazione di volontà adesiva da parte di quest'ultimo; senonché, la regola soffrirebbe un'eccezione, quando l'offerta fosse fatta nell'interesse esclusivo dell'oblato e non vi fosse da parte sua alcun motivo per rifiutarla. E questo, conclude l'autore, potrebbe essere forse una spiegazione dell'art. 1108 del *code Napoléon*, che sembra esigere il solo consenso della parte che si obbliga. Allo stesso modo, Baudry-Lacantinerie e Barde escludono la necessità dell'accettazione dell'oblato in via del tutto eccezionale, quando quest'ultimo non abbia motivo di rifiutare l'offerta contrattuale, essendo in tal caso l'offerta di tal natura da non chiedere risposta. Questa discontinuità tra dogma e regola concreta continueranno ad accompagnare la trattazione del problema nella dottrina francese." See Fenet, P. A. *Naissance du Code Civil: la raison du législateur: travaux préparatoires du Code Civil rassemblés par Fenet*. Flammarion, 1989. p. 349: "*II. Du Simple au Complexe. De cette philosophie, le législateur tirera un méthode générale pour réglementer chacun des contrats: chercher le principe de l'institution en le situant dans un ordre généalogique allant du simple au complexe. Ainsi l'échange, forme la plus primitive du rapport social, précède-t-il la vente,*

In reality, the comparison between the two concepts reveals a sharp distinction. While the Restatement Second of Contracts enunciates a portrait of a contract as a legally protected agreement to which the Law provides remedies before breaches, the French version emphasizes the meeting of minds character to fostering obligations. This explanation appears tautological since explaining a concept always requires a circular deployment of words conveying the same idea as the one to be clarified[311], except for one ambition: distinguishing how the common law system takes remedies as the most critical feature of contractual obligations. Nonetheless, incurring in tautologies does not apply to the present theme. Every invention in contractual theory is followed by stirred debate over the sources of changes and development. Besides, contracts are abstractions when people assign a role to a written document, not physical objects which can be seen and recognized by the senses. As professor Atiyah stated, "agreements and promises are not physical objects which can be seen and recognized as such. They are themselves abstract concepts, just as much as the concept of contract itself."[312]

Following the publication of the Restatement Second on Contracts, Patrick Atiyah prefaced his introduction to the Law of Contract[313] to include Ian Macneil's relational and transactional approaches embraced in the Restatement [314] to better reckon the premise of a contract as an enforceable agreement[315]. The reason relies mainly on enforcement of the promise itself is not a necessary consequence of seeking relief, usually converted into damages.

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qui suppose l'institution des signes, la vente, le louage, et ainsi de suite." To situate those authors in the French exegesis school see ALPA, Guido. Foreign Law in International Legal Practice: An Italian Perspective. *Tex. Int'l LJ*, 2001, 36: 495. And also Hakim, Nader. "Continuity or Rupture in the History of Juridical Thought: Exegesis, Transtextuality and Legal Positivism of the Cours de Code Napoleon by Charles Demolombe." *Historia et ius*, vol. 12, 2017, p. 1. A very relevant and concise reconstruction on the French scholarship see Carbonnier, Jean. *Droit Civil, Vol. I [1951]*. Quadrige Manuels/Presses Universitaires de France, 2017. pp. 288-289.

311 Hegel, Georg Wilhelm Friedrich. *The Philosophy of Right*, translated by T. M. Knox. Oxford University Press, 1952. p. 9: "Philosophy has to do with Ideas, and therefore not with what we are commonly dubbed 'mere concepts.' On the contrary, it exposes such concepts as one-sided and false, while showing at the same time that it is concept alone (not the mere abstract category of the understanding which has actuality, and further that it gives this actuality to itself."

312 Atiyah, Patrick Selim. *The Law of Contract*, 4th ed. Oxford: Clarendon Press, 1989. p. 41.

313 Atiyah, Patrick Selim. *The Law of Contract*, 4th ed. Oxford: Clarendon Press, 1989. p. v.

314 Ibid pp. 40-58.

315 MacNeil, Ian R. "Relational contract: What we do and do not know." *Wis. L. Rev.*, 1985, p. 483.

In his reading of contractual conceptualization, he exhorts: "*Another, and perhaps more fundamental problem is that definitions in terms of agreements or promises assume that agreements or promises are 'things' which exist outside the Law and can easily be recognized as such*"[316].

Atiyah invites his readers to grow awareness of how the 19-20th contractual definition, as coined in the American Restatement of contracts, might "*lead to the ridiculous conclusion that no law of contract then existed*" (before modern legal theory in his acceptation). The Second American Restatement of Contracts promoted a paradigmatic turn, offering a non-neutral definition that would detach the American common law tradition from its medieval roots[317].

Whereas the continental tradition illustrated in the French definition abandoned the legal remedies and legal procedure concerns while providing a contract definition, the one provided by the American scholarship still relies on remedies as the core of a contractual theory. As pointed out by Maitland in his "*The History of the Register of Original Writs*," the understanding of substantive Law must be a collateral outcome for the student. In that regard:

> "*Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive Law will come of itself.*"[318]

What emerges from the nature of a breach is defining the enforceability of a promise before the court. Another preoccupation concerning promises is their binding character, regardless of changing times or circumstances or the presence of undeniable communicatory intention. Although both exemplified models offered above seemed to be apart epistemologically, in reality, they are not as far afield as imagined. In A. W. B. Simpson's essay

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316 Atiyah, *The Law of Contract*, p. 41.
317 p. 6 Introduction Atiyah.
318 Maitland, Frederick W. "The history of the register of original writs." *Harvard Law Review*, 1889, pp. 97-115.

on "Innovation in Nineteenth Century Contract Law,"[319] the author notes the novelty of a general contractual theory in English and later American scholarship by quoting Atiyah's passage:

> "*Although much of the English law of contracts has roots going back to the Middle Ages, most of the general principles were developed and elaborated in the eighteenth and nineteenth centuries*."[320]

The turning point for English jurisprudence's adoption of a general theory is found in *Rann v Hughes*[321], in which it was recognized that the enforceability of a promise depended on writing or consideration.

However, while the continental European tradition provided an appearance of continuity, in opposition, the common Law offered a diverse path toward a general contractual theory. The evidence of this divergent route is also recognizable in Pound's observation of the Law of Contracts and promises:

> "*We do not give effect to promises on the basis of the will of the promisor, although our courts of equity have shown some tendency to move in that direction. The attempt to Romanize our theories of liability involved a Romanized will theory of contract. But no one who looks beneath the surface of our law reports can doubt that the attempt has failed wholly."* [322]

As Pound proceeds in his observations towards similarities and differences between promises among different traditions, what emerges is not a more Germanic *causa debendi* oriented theory of promises adopted by the common law tradition[323], but instead, one which triumphed in the Continental tradition a natural Law Grotius' theory[324].

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[319] LQR 1975.
[320] Simpson apud Atiyah.
[321] [(1778) 4 Brown 27; 7 Term Reps 350n; 101 ER 1014n Court of Exchequer Chamber]. See Simpson, Alfred William Brian. *Legal theory and legal history: Essays on the common law*. A&C Black, 1987. p. 174.
[322] See an Introduction to the Philosophy of Law, Yale lectures 1921, p. 151-152.
[323] Pound, An Introduction, p. 144.
[324] Pound, p. 146.

As Simpson pointed out, the most prominent English authors derived their ideas from late medieval writings such as Saint-German and Pothier. This statement, as accentuated by the author, cannot bring to the conclusion that the common law tradition did not have a canon of knowledge of how to approach contractual agreements but that the old medieval remedies to be sought in different courts, such as Chancery and Equity contrasted by the treatment of unwritten or naked pacts under the continental tradition[325]. Furthermore, even so, as it will be demonstrated, with no such clear distinction since the canonical influences were carried on the courts of Conscience later named in Equity.

The French and the American treatment of contractual concepts have an apparent incongruity, considering that for both systems, recognizing a breach and the available remedies depended upon some premises. At least one vanished from the French system to facilitate and promote exchanges, the notion of causa (2016 ordinance). However, excavating the notion of a bargain will make the notion of causa apparent since causa is also a justification for enforceable exchanges[326].

Former covenants were *"by definition an agreement to do something in the future, and as such could be contrasted with other consensual transactions which actually conferred or released rights in things."*[327]. According to Jackson[328], "*the proposition that contract rests on agreement appears to begin with St. Germain's Doctor and Student, first published about 1523*."

Therefore, searching for the etymology of the word *contrahere* does not necessarily capture the accuracy of the juridical term. The Latin root *traho*, originated from the Proto-Indo-European ***trag^{h}-,*** has many connotations, such as drawing attention, bringing together, or

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[325] Fry, Edw. "Specific Performance and Laesio Fidei." *LQ Rev.*, vol. 5, 1889, p. 235.
[326] For the American unHamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (N.Y. 1891), a landmark for consideration's clarification
[327] Simpson, The rise of assumpsit, p. 19.
[328] Jackson, R. M. "The Scope of the Term Contract." *L.Q. Rev.*, v. 53, 1937, p. 525.

plundering. That is why instead of searching for the contractual semantics, one feels inclined to rebuild the tendencies enclosed in the word contract, primarily expressed in its substance and the available remedies for the category[329].

From the point of establishing whether wills among the parties became the centerpiece of contractual arrangements, all the developments in contractual theory ensued: the presence of a vestment for the pact[330]; if not the existence of a legitimized exchange (causa or consideration); a valid excuse for not honoring a promise (exception); the frustration not attributed to the parties given alteration of the circumstances; defects of interpretation on contractual language.

By providing this view, A. W. B. Simpson reaffirms in "A History of the Common Law of Contract: The Rise of the Action of Assumpsit" [1975] what he stated in his "The Law Quarterly Review" article, that assumpsit served as a remedy for broken agreements[331].

A world in which promises were not binding would result in a state of suspicion, preventing the unfolding of marriages, sales, and all human exchanges relying on wills. That specific point was also tackled in the dialogue between the Doctor of Divinity and the Student of Common Law when the Doctor expressed perplexity on the absurdity of the Laws of England not releasing a debtor in case the receipt was lost[332]. The Student responds that if words release the debtor from his obligations, the security of all obligations would be in jeopardy[333].

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[329] Friedmann, Daniel. "Rights and Remedies." *Comparative Remedies for Breach of Contract*, edited by Nili Cohen and Ewan Mckendrick. Hart Publishing, 2005. p. 3: "The right derives from the remedy and as a matter of sequence the remedy precedes the right. Consequently, the absence of a remedy points to the non-existence of a legal right."

[330] For a comprehensive historical account see Barton, J. L. "Causa promissionis again." *Tijdschrift voor Rechtsgeschiedenis/Revue d'histoire du droit/The Legal History Review*, vol. 34, no. 1, 1966, pp. 41-73.

[331] Introduction, p. 06.

[332] Saint German, Christopher; Plucknett, Theodore Frank Thomas; Barton, John L. *Saint German's Doctor and Student: Edited for the Selden Society by TFT Plucknett and JL Barton*. Selden Society, 1974.

[333] De Luca, Luigi. "Aequitas canonica ed equity inglese alla luce del pensiero di C. Saint Germain." *Ephemerides iuris canonici*, vol. 3, 1947, pp. 46-66. pp. 46-47.

The awareness on the importance of securing a promise for the development of solidity on business transactions surface consistently also in Austin, when in his lectures of Jurisprudence, he offered a concept of *pollicitatio* as "a promise made, but not accepted"[334], a shift initiated by Powell occurred in the Common Law.[335]

The concept conveyed a further step splitting promises into several stages since if it lacked acceptance was not yet binding. The introduction of offer and acceptance would yield unfolding problems as misrepresentation in English Law, embodied in the House of Lords decision in *Heilbut, Symons & Co. v. Buckleton*[336].

Combined with the American leading case *Carlill v. Carbolic Smoke Ball Co*[337], as stated by Simpson, the doctrine of the *animus contrahendi* was elevated to the scaffold of serving "as a unifying element to explain in terms of the consensus theory of contract the absence of contractual liability for jokes, promises of gifts, domestic and social arrangements, pre-contractual remarks which sensible people do not take seriously and situation where standard form contracts exclude the jurisdiction of the courts in order for the dominant party to be judge in his own cause."[338]

The idea that a mere agreement for a walk or reading a book together is not considered an enforceable promise stems from the principle of contractual freedom and the concept of "offer and acceptance." The establishment of the offer and acceptance theory marked a shift in

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[334] Austin, John, *Lectures on Jurisprudence* 1885.

[335] Powell, Joseph John. *Walpole*. Thomas & Thomas, reprint 1802, 1790, Vol. I, 335 : "The Roman Law divided convention or agreements among men into two kinds: namely Promises and Contracts. A promise and a contract differed in this respect simply: the former proceeded from the promiser [sic] alone who preferred it, and did not bind until acceptance by the promisee, so that the promiser till then was at any time, at liberty to retract. A contract was the consent of two or more persons to something to be given or done. It followed of course, that a promise accepted immediately became a contract; for, then, there was the assent of two persons to the thing promised; viz., one to perform and the other to receive." See also A. W. B. Simpson, Innovation in Nineteenth Century Contract Law, p. 259.

[336] [1913] AC 30. The case refers to a large purchase of stocks supposed to be from a company with a vast extension of rubber trees turn out to be of lesser value than expected in which plaintiff sued for damages based on the misrepresented value of the company.

[337] [1893] 1 QB 256.

[338] Simpson, Innovation, p. 265.

the common law system's approach to contract law, enabling a more nuanced approach to determining the enforceability of promises.

According to this theory, a contract is only considered enforceable if there is a clear offer made by one party, which is then accepted by another party. This means that for a promise to be enforceable, it must be clear that both parties intended to enter into a binding agreement. A mere agreement for a walk or reading a book together, without any clear intention to enter into a binding agreement, would not be considered an enforceable promise.

The court's decision in the case of Heilbut, Symons & Co. v. Buckleton, [1913] AC 30, further reinforced this idea by addressing the issue of misrepresentation in English contract law. In this case, the court held that a mere agreement, such as a promise to go for a walk or read a book together, would not be considered a binding agreement and would not be enforceable.

However, the case of *Carlill v. Carbolic Smoke Ball Co* [1893] 1 QB 256 marked a turning point in the development of the enforceability of unilateral promises[339]. In this case, the court ruled in favor of the plaintiff, allowing her to collect the reward promised by the defendant even though the promise was made to the general public. This decision established the principle of enforceability of unilateral promises, paving the way for the recognition of binding promises made to the general public[340].

In French Law, art. 1101 of the Napoleonic Code translated into *Maltzkorn c. Braquet*[341]. Given the laconism of the French Cassation Court to exhaust juridical arguments

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[339] For the innovation the case on mass advertisement and the influenza affecting Europe and the U.S see McGinnis, Janice Dickin. "Carlill v. Carbolic Smoke Ball Company: Influenza, Quackery, and the Unilateral Contract." *Canadian Bulletin of Medical History*, vol. 5, no. 2, 1988, pp. 121-141. p. 126: "Basically the legal question boiled down to whether the promises in Carbolic's advertisement constituted mere "puffery" and were understood by Mrs. Carlill on that level or whether they constituted a contract between Carbolic and its customer."

[340] Beale, H. G; Bishop, W. D.; Furmston, M. P. *Contract cases and materials*. 3rd ed. Butterworths, 1995. pp. 14-15, 202.

[341] J.C.P. 1969 II n. 15797 See in Graziano, Thomas Kadner. *Comparative Contract Law: cases, materials, and exercises*, 2nd edition. Elgar, 2019. pp. 98-99.

while delivering a decision, the ruling voided the Court of Appeal judgment, granting another one. However, it followed a different *rationale* than the one deployed in Carlill, stating that it consisted of an invitation to treat instead of engaging the parties into a binding promise.

One of the effects of Private Law codification in the continental tradition has been to set aside Adjective or substantive Law from procedural grounds to bring forward a claim, a distinction not adopted in the American Restatement once it starts the definition by addressing remedies that arose from breaches. Will a contract still exist if a breach did not occur? The language of Restatement Second indicates that breach is not a requisite for contractual existence. However, if the Law does not assign a remedy for a hypothetical breach, this agreement will be moral or pertaining to another sphere of human relationships but not juridical.

Agreeing upon an exception that affected what was previously agreed is similar to celebrating peace in a consensus that has dissolved[342].

Consensualism's consolidation replaced pre-defined contractual forms. That process was long and required codification to entrench the idea that promises were binding regardless of the form contract would take. From observing modern codifications, one will find multiple forms of entering contracts enumerated in a legal diploma, but the list is not exhaustive.

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[342] Peterlongo, Maria Emilia. *La Transazione nel Diritto Romano*. Dott. Giuffrè editore, 1936-XIV, p. 186: "Questa era, dunque, la configurazione di una transazione conchiusa mediante patto, che, pertanto, non dava azione ma generava eccezione: *nuda pactio obligationem non parit*, sed parit exceptionem (D. 2, 14, 7, 4). Eccezione, che aveva un'efficacia processuale negativa in quanto si poteva far valere solo negando il diritto accampato dall'attore, dimostrando che questo aveva cessato di esistere. Infatti, una transazione convenuta mediante semplice patto lasciava adito al risorgere della controversia, ma occorreva però, che una delle parti avesse esperito effettivamente azione in contraddizione alla convezione conchiusa perché si potesse mettere in funzione *l'exceptio.* In un solo caso la transazione convenuta per semplice patto portava l'estinzione *ipso iure* del rapporto se cui si transigeva, cioè in tema di delitti, dei quali diremo trattando dell'oggetto della transazione. Il patto di transazione portava, dunque, una difesa negativa e forniva una persecuzione imperfetta del proprio diritto come qualunque mezzo indiretto." This exception had a negative procedural effect, as it could only be asserted by denying the right claimed by the plaintiff and demonstrating that it had ceased to exist. A transaction agreed to through a simple agreement left the possibility of the controversy arising again. Still, one of the parties needed to take legal action in contradiction to the agreement for the exception to take effect. The only exception to this was in the case of crimes, where the transaction concluded by simple agreement resulted in the extinction of the relationship being negotiated. Thus, the transaction agreement provided an opposing defense and offered an imperfect means of enforcing one's rights, like any indirect means. The idea arises as a defense brought by the defendant.

However, regarding property rights, legal codes across continental tradition confirm that the *numerus clausus* list is a feature dedicated to enumerating property rights, not contracts[343].

The premise is that parties' autonomy enables the creation of agreements not conceived by the legislators. Instead, when it comes to property rights, the State needs to ensure rigid forms since it will guarantee the stability of those rights before the juridical regime. Except for gifts and donations, a branch of contractual discipline in which states intervene to encourage policies on a myriad of familiar relations, contractual arrangements had as a feature of high margins for improvisation, in a sense that the state role became progressively to allow the parties to decide whether they wanted to impose liabilities on the other and define the terms by which they would be ruled. In that regard, the contract terms were decided by the involved parties, and the role of the courts was to enforce them. Imposing public policy and morals as *indisposable* duties was among the few constraints courts should overrule parties' autonomy and contractual sanctity.

Although while addressing the needed binding nature of promises, the step further of recognizing them as enforceable arises from the recognition that fairness ceased to be a concern as long as the rules of the contractual game were respected[344]. While the pre-established forms of contracts were a simplified way to provide juridical content to the parties, stipulating a formula comprehensible by those celebrating agreements, the condensed version of form and value provided a mechanism for actionability before the judge. The natural development of those changes was the free subjects from the duty to comply with strict formulas[345], granting

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[343] Mezzanotte, Francesco. "Liberté contractuelle e droits réels (a proposito di un recente dialogo tra formanti nell'ordinamento francese)." *Rivista di diritto civile*, vol. 59, no. 4, 2013, pp. 857-873.

[344] See Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Traditions*. Oxford University Press, 1990. p. 576: "A Final word on *pacta sunt servanda*. We have seen how the praetor's promise, as related by Ulpian in D.2, 14, 7, 7. Was turned into this general maxim by the canon lawyers. Its import was, first of all, to assert the principle of consensualism: all pacts are binding. Regardeless of whether they are clothed or naked. However, once this principle had generally gained acceptance, the significance of '*pacta sunt servanda*' shifted slightly. The maxim was now taken to imply that contractual promises must under all circumstances be honored."

[345] Calasso, Francesco. *I glossatori e la teoria della sovranità. Studio di Diritto Comune Pubblico*, 3rd ed. Dott. A. Giuffrè editore, 1957. pp. 167-169: "48. Ma il sistema giuridico è prima di tutto un sistema logico, che ha

the parties the possibility to make promises that would only be the business of public authorities when it was needed to enforce them. In this situation, to examine if the parts followed the minimal procedural grounds to claim a promise had a cause and therefore were actionable before the judges. Such modifications on forming a general law of contracts, an *non*-existent topic in Classical Roman Law, enabled parties to seek invalidation of agreements lacking the reasons why parties bargained for in the first place. A party intended to raise an exception for a non-fulfilled promise circumventing a given promise on the grounds of non-enforceability.

Another English landmark Central London Property Trust Ltd v High Trees House Ltd.[346] illustrates the role of promises in times of emergency[347]. The plaintiff (Central London Property Trust) leased a block of flats to the defendant (High Trees House) for a 99-year term. During World War II, the defendant was unable to find tenants for the flats and approached the plaintiff to request a reduction in the rent. The plaintiff agreed to reduce the rent by half for the duration of the war, and the parties continued to perform under the modified agreement for several years after the war ended.

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una sua vita interiore ed armonica: il rinnovamento profondo de uno degli *apices iuris* sui quali il sistema è incardinato, porta necessariamente con sé trasformazioni altrettanto profonde in ciascun elemento del sistema. Sarebbe un errore peraltro tentati di credere e più comunemente si crede mentre è più corretto pensare anche qui, come nella vita di ogni altra creazione dello spirito umano, a un processo circolare – come oggi usa dire –, che si attua, impegnando tutte insieme le forze storiche che vi hanno concorso. Se da questo angolo visuale si guardi, non sarà difficile ritrovare altre manifestazioni concordi all'identico moto: e ad una di queste, alla più vicina e legata al problema che abbiamo discusso, vien fatto di pensare, come alla conclusione spontanea di questo processo storico: alludo ai soggetti dell'ordinamento giuridico, e al problema dell'autonomia della volontà privata. Il parallelismo è impressionante: basterebbe guardare alla storia del negozio giuridico, e al progressivo emergere dell'elemento obiettivo, la causa, che sgretola lo scudo della forma – caratteristico di un'epoca in cui la volontà privata, per acquistar vita nell'ordinamento giuridico (*ius*) e produrvi delle conseguenze, deve calarsi negli stampi preordinati da questo –, e scopre via via la sostanza del negozio al quale la volontà ha inteso dar vita. Anche qui, la volontà privata può vivere nell'ordinamento giuridico nei modi e limiti che questo le assegna: ma entro essi modi e limiti, è padrona di se stessa. Sul terreno del diritto privato si riproduceva cioè il problema pubblicistico della *potestas* degli ordinamenti particolari, viventi entro l'orbita dell'impero universale. Come su questo terreno il problema nacque soltanto quando la personalità politica e giuridica di questi ordinamenti cominciò a emergere dall'universalismo imperialistico in cui per l'innanzi era stata dissolta, poiché di una *potestas* non avrebbe potuto discorrersi fino a quando essi venivan concepiti <<*loco privatorum*>>; così sul terreno privatistico la capacità creativa dei soggetti dell'ordinamento giuridico potette essere riconosciuta e divenire operante soltanto quando essi riuscirono a costruire una propria *persona*, da contrappore alla *potestas* dell'ordinamento, assorbendo nell'ambito della loro *facultas* elementi vitali di questa *potestas*."

346 [1947] KB 130 (Eng. CA)

347 Cheshire, G. C.; Fifoot, C. H. S. "Central London Property Trust Ltd v. High Trees House Ltd." *LQ Rev.*, vol. 63, 1947, p. 283.

However, in 1945 the plaintiff demanded full rent for the flats. The defendant argued that the plaintiff was estopped from claiming full rent, as the plaintiff had promised to accept a reduced rent during the war and had acted upon that promise by continuing to perform under the modified agreement.

The court ultimately held that the plaintiff was not estopped from claiming full rent, as the promise to accept a reduced rent was made during an emergency and was therefore not binding in the long term. However, the case established the doctrine of promissory estoppel in English Law[348], which holds that a promise made without consideration can still be enforceable if the promisor should reasonably have expected the promisee to rely on the promise and the promisee has indeed relied on it to their detriment.

I.V. Freed men entering transactions and the modern world making

> *"From status to contract is the passing phrase of the last century, and it may be safely assumed that it will be the passing phrase of this."*[349]

Oliver Wendell Holmes's "The Common Law" stated "*the liberty of making any contract which the parties choose, without let or hindrance from the law*."[350] In "Contract as Promise," Charles Fried argues that the purpose of contract law is to enforce promises and that the basic principle of contract law is that "promises should be enforced unless there is a good reason not to do so."[351]

Before moving to contractual terrain, it is relevant to understand the mechanism through which individuals were released from their former role in society as a serf, a peasant, or someone who did earn enough to participate in the economy of money circulation. An average

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[348] See Samet, Irit. *Equity: Conscience Goes to Market*. Oxford University Press, 2018. p. 96.
[349] Maine, Henry. *Ancient Law*, 1861.
[350] Holmes, Oliver Wendell, 1881, p. 251.
[351] Fried, Charles, *Contract as Promise*, 1981, p. 10.

person's capacity to offer their word as an oath and to bind themselves and their assets into juridical operations is a new device, first restricted to the higher classes. In pre-modern societies, individuals were often bound to their social position by a status system[352]. This was particularly true in feudal societies, where birth and occupation rigidly defined the social hierarchy.

However, a new paradigm emerged with the advent of the modern era: individuals began to assume a more entitled role in society based on contractual relationships. As the feudal system began to break down, individuals were increasingly able to negotiate their contracts and assert their rights. This led to a growing sense of individual agency and autonomy as people began to see themselves as free agents rather than mere subjects.

The rise of the bourgeoisie was also a critical factor in the shift towards contract-based relationships[353]. As the middle class grew in size and influence, they began to demand greater autonomy and control over their economic and social lives. This often meant negotiating contracts with other individuals or businesses rather than simply accepting their place in a predetermined social hierarchy.

Interdisciplinary perspectives have also shed light on the influence of capitalism on the Law of contracts. Polanyi argues that capitalism is an inherently unstable system that can only be stabilized by state intervention[354]. Recognizing this aspect regarding the nature of an

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[352] See Weber definition of obligations.

[353] Schiavone, Aldo. *Storiografia e critica del Diritto: per una 'archeologia' del diritto privato moderno*. De Donato editore, 1980. p. 49: *"Ad una ad una, le grandi categoria che hanno retto l'intero edificio del diritto privato della società borghese, e su cui si è poggiato tutto l'arco della separazione fra società civile e sfera dello Stato nell'età del primo capitalismo – il contratto come scambio fra 'eguali', la proprietà come godimento esclusivo di un bene da parte di un soggetto, il 'negozio giuridico', come modello classico dell'autonomia dell'operatore 'privato' nella sfera sociale ed economica, il 'diritto soggettivo' come misura individuale di un ordinamento 'eguale'— tutte queste figure ritornano ora non più come le forme dominanti di un processo, in grado di totalizzare e di dirigere senza residui l'intera storia di una società, ma come immagini labili, modelli cui è sempre più difficile far corrispondere contenuti reali, cui è sempre più impossibile assegnare un ruolo di conoscenza e di direzione nella società contemporanea."* Among one of the best accounts on the French juridical historiography is Arnaud, André-Jean. *Essai d'analyse structural du code civil Français.* Paris: Librairie Générale de Droit et de Jurisprudence, 1973. p. 3.

[354] Polanyi, Karl. *The Great Transformation: The Political and Economic Origins of Our Time*. Beacon Press, 1944. pp. 43-66.

economic system implies recognizing that as sophisticated and harmonized as legislation can be, the system is corrupted at its core and functions as long as the ruptures are restrained to disputed agreements. Once the system goes out of balance and crisis affects the role system, the Law will require innovation, as A. W. B. Simpson advanced.

In recent years, the law of contracts has seen a marked progression, with courts recognizing the significance of fairness and justice in contractual relationships. This has led to the development of doctrines such as unconscionability and good faith, as outlined in the Restatement (Second) of Contracts § 208 (1981). These advances demonstrate a growing understanding that contracts are not solely legal instruments, but also social and economic relationships. This shift has been reflected in the law of contracts, which now places a greater emphasis on the protection of individual rights and freedoms in commercial transactions[355].

A long development was necessary to consolidate the early theories allowing for the incorporation of contractual social theory in the state and private interactions. The shift towards contract-based relationships was also reflected in Rousseau and Kant. Rousseau's concept of the social contract, which argued that individuals entered into a contract with society to secure their freedom and rights, emphasized the importance of individual autonomy and agency[356]. Similarly, Kant's notion of autonomy - the idea that individuals should be free to make their own choices and determine their destiny - reflected the growing sense of individual entitlement and empowerment that characterized the modern era[357].

The shift from status to contract represented a fundamental transformation in how individuals understood their place in society. By asserting their agency and negotiating their

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[355] Berman, Harold. *Law and Revolution: The Formation of the Western Legal Tradition*. Harvard University Press, 1983. pp. 181-205. See also Berman, Harold J.; Reid Jr, Charles J. "The transformation of English legal science: from Hale to Blackstone." *Emory LJ*, vol. 45, 1996, p. 437.

[356] Rousseau, J.-J. *The Social Contract*. Penguin Classics, 2003.

[357] Kant, I. *Practical Philosophy*. Cambridge University Press, 1996. pp. 215-293.

contracts, people could break free from the constraints of traditional status-based hierarchies and assert their rights and interests.

The default assumption in contract law that contracts are enforceable, even if they are unjust or oppressive, reinforces the power dynamics that lead to such contracts being formed in the first place. The inconsistent and subjective application of the doctrine of unconscionability contributes to uncertainty and confusion in contract law, further exacerbating the power imbalances and inequalities that the doctrine is intended to address. As a result, the doctrine of unconscionability highlights the need for ongoing critical analysis and reform of contract law to ensure that it serves the interests of all parties and promotes fairness and justice. It requires a more interdisciplinary and culturally sensitive approach that takes into account a more comprehensive range of perspectives and values, including feminist, critical race, and Marxist theories[358]. Only through such an approach can the legal system be transformed to address the systemic issues that give rise to the doctrine of unconscionability.

I.VI. The deployment of equity in unconscionable bargains in the common law tradition

Unconscionability conveys a notion of the unfairness of an exchange. A. W. B. Simpson observed that consideration and the definition of gift transactions under Roman influence consisted of the fundamental divide between continental and Common Law systems[359].

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[358] See for a critical appraisal Dalton, Clare. "An essay in the deconstruction of contract doctrine." *Yale Lj*, vol. 94, 1984, p. 997. As stated by the author, the unconscionability doctrine contains a tension between private and public since it conveys an idea that the state is harming private agreements presupposing an interference. In contrast, in reality, it condenses a portrait of a story, a narrative in those doctrines and theories. Dalton calls for a more critical and interdisciplinary approach to contract law that takes into account a wider range of perspectives and values, including feminist, critical race, and Marxist theories. This reform aims to ensure that contract law serves the interests of all parties and reflects a more equitable distribution of power and knowledge.

[359] Simpson, A. W. B. *A History of the Common Law of Contract: the rise of the Action of Assumpsit*. Clarendon Press, 1987. p. 466: "The recognition of nominal consideration is usually linked by modern writers to the doctrine that the courts will not inquire into adequacy of consideration, but his is a confusion. A system of law could very well refuse to hold inadequacy of price in, say, a sale a defence, yet insist upon something more

In civil law jurisdictions, the principle of good faith (sometimes called "*bona fide*") is often invoked to address unfair or abusive contract conduct. Good faith implies that the parties to a contract should act honestly and not take advantage of each other. This principle can be used to challenge contract terms that are considered to be unconscionable or oppressive.

Some civil law jurisdictions, such as Germany[360], have specific standards or clauses laws for dealing with unfair contract terms. For example, the German Civil Code contains provisions that allow courts to strike down contract terms deemed unreasonably detrimental to one party.

Specifically, section 307 states that any contractual provision which unreasonably disadvantages one party, contrary to the requirements of good faith, is ineffective to the extent of the disadvantage. The provision also specifies that if a contract term is ambiguous, it should be interpreted in favor of the party that did not draft it.

This provision has been interpreted by German courts to allow them to strike down contract terms deemed unconscionable or oppressive. In addition, the German Civil Code also includes other provisions that protect consumers from unfair contract terms, such as section 305, which prohibits using standard contract terms that are unfair or unreasonable. The doctrine of unconscionability is recognized in German contract law and is commonly called "*Wucher*" or "unreasonable exploitation."

Under German law, contracts or contract terms may be considered unconscionable if they are one-sided, unfair, or contrary to the principle of good faith. Section 138 of the German Civil Code sets out a general prohibition against agreements that are "immoral" or "against the

than a mere derisory price; this would involve an insistence that there really was a sale. This Roman jurists did, for they were anxious to distinguish gifts from other contracts. Common lawyers do not seem to have been much interested in distinguishing gifts transactions from non-gratuitous transactions, and no doctrine about derisory considerations ever developed; it is indeed notorious that modern contract law has inherited from the past a body of doctrine under which it is well-nigh impossible to differentiate promises of conditional gifts from contracts. Nominal considerations confuses categories."

[360] Dawson, John P. "Unconscionable Coercion: The German Version." *Harv. L. Rev.*, vol. 89, 1975, p. 1041.

law" and that may be considered unconscionable. This provision applies to all types of contracts, including consumer contracts, and allows German courts to strike down unconscionable contract terms.

In addition to section 138, specific provisions in German law protect consumers from unfair contract terms[361], such as section 307 of the German Civil Code. This provision allows courts to strike down contract terms that unreasonably disadvantage one party or are contrary to good faith and has been interpreted by German courts to allow them to strike down contract terms deemed unconscionable or oppressive.

In French law, unconscionability is known as "lésion" or "lésionnaire." Lésion refers to a situation where one party to a contract takes advantage of the other party's weakness, inexperience, or vulnerability to impose unfair or unfavorable terms.

Under French law, lésion is regulated by article 1168 of the French Civil Code, which provides that a contract may be rescinded or modified by a judge if one party has taken advantage of the other party's weakness to obtain an excessive benefit. The article also sets out a specific formula for calculating excessive benefit, generally interpreted as a benefit that exceeds one-half of the actual value of the obligation undertaken.

In addition to article 1168, French law contains other provisions protecting consumers from unfair contract terms.

Furthermore, unconscionability has been adopted in some civil law jurisdictions through international conventions and treaties, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), which many countries around the world have ratified. The CISG includes provisions on the validity of contracts, and the avoidance of agreements concluded under duress or unconscionable[362].

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[361] Kötz, Hein; Flessner, Axel. *European Contract Law*, translated by Tony Weir. Clarendon Press, 1997. p. 130.

[362] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3. Article 28 of the CISG states that "If the contract has been validly concluded but, after it has been concluded, one of the parties discovers that the contract is subject to a fundamental breach of contract or that the contract

Under the common law tradition, an amalgamation of different doctrines needed disentanglement over the centuries to form a consistent distinction between the available remedies and defenses for disputing unfair bargains. An aspect reassured by Professor Gordley while stating "This explanation did not square easily with another rule inherited from the eighteenth century: that courts of equity will not grant specific perfomance of an unconscionable bargain. Just how firmly established this rule was in the eighteenth century is currently a matter of dispute between Professors Simpson and Horwitz."[363]

The challenge of determining which principle to apply is not a result of conflicting legal precedents, but rather the complex and dynamic nature of legal theories surrounding the concept of a just price and the enforceability of promises[364]. This has led legal scholars like Horwitz to propose the idea of a transitional period where courts would not enforce promises that are deemed unfair or unreasonable. [365]

Horwitz argued that the idea of perfect contracts, immune to any disputes, emerged from market forces that sought to liberate economic actors from the need to balance exchanged values. On the other hand, A. W. B. Simpson and other legal scholars criticized the romanticized portrayal of the past, pointing out that the development of contractual doctrines

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is contrary to the requirements of good faith and fair dealing, the party affected may avoid the contract."In other words, if a party discovers that a contract term is unconscionable or that the other party has committed a fundamental breach of contract, that party may have the right to avoid the contract. The article refers to the principle of good faith and fair dealing, a fundamental principle of contract law in many legal systems, including civil law jurisdictions. SAMEUL, Geoffrey. Contract and the comparatist: should we think about contract in terms of 'contracticles', in Comparative Contract Law, ed. Pier Giuseppe Monateri, Cheltenham: Edward Elgar, 2017, 67-94, p. 92: "It is a matter of continual reduction, of uncovering the simplicity that lies hidden behind the apparent complexity and disorder of phenomena. That comparative law is plagued by this paradigm is evident in this European general theory of contract codification projects in which highly complex notions such as reasonableness, or difficult problem areas like mistake, are reduced to normative assertions that are so general as often to be meaningless when applied to facts." The author argues that comparative law is plagued by a reductionist paradigm, which seeks to simplify complex concepts and phenomena by reducing them to normative assertions. This can be seen in projects aimed at codifying European contract law, where complex ideas like reasonableness or difficult issues like mistake are reduced to general statements that can often be meaningless when applied to specific situations.

[363] Gordley, James. "Equality in exchange." *Calif. L. Rev.*, vol. 69, 1981, pp. 1587-1598.

[364] See Cohen, Morris R. "The basis of contract." *Harv. L. Rev.*, vol. 46, 1932, p. 553.

[365] Horwitz, Morton J. *The Transformations of American Law: 1870-1960*. Oxford University Press, 1992. p. 35.

was much more nuanced than previously believed. They argued that many evidentiary cases had been misinterpreted to support an inaccurate depiction of legal precedent[366].

The harsh treatment in common law courts was alleviated by courts of equity, which provided remedies for harsh agreements. They described the breaking of promises as "unreasonable," "unfair," "unjust," "unequitable and unconscientious," "hard and unequal," and other similar terms, based on cases from the 17th and 18th centuries in courts of equity.

However, Horwitz's theory contradicts the findings on the development of contractual obligations. A review of both the continental and common law traditions shows that it is difficult to reconcile the past decisions of courts of equity and how the church was able to enforce promises made before God while also claiming that such promises were binding[367], regardless of their form. The result of any attempt to reinterpret the past will vary depending on the interpretation, since enforcing bare promises by courts of law required significant effort and delicate partnerships to translate canonical and legal doctrines into a uniform set of rules across borders and disciplines[368].

An iconic example of this direction is St. Germain's dialogue between the Doctor of Divinity and the Student of the Common Law. By posing the question, "*what is a nude contract or a naked promise after the laws of England*?" the author incursion ventures on terms present in the Summae collected by scholars of cannon Law from the region of Piemont[369]. Those ideas would not entrench immediately on the courts of Law and the courts of Conscience but

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[366] Simpson, AW Brian. "The Horwitz thesis and the history of contracts." *The University of Chicago Law Review*, vol. 46, no. 3, 1979, pp. 533-601.

[367] Atiyah, P. S. *Promises, Morals, and Law*. Clarendon Press, 1981. p. 7: "Modern contract theory is still largely based on the 'classical contract model', a model which was developed between 1770 and 1870, by which time the ideal of freedom of contract had reached its highest point in the Courts, though it was perhaps already in decline elsewhere."

[368] Gordley, James; Hao Jiang, and Arthur Taylor Von Mehren. *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials*, 2nd ed. Cambridge University Press, 2006. p. 488.

[369] Simpson, *The rise of assumpsit*, p. 375 ss

culminate in the "principle stated in Golding's case (1586): 'In every action upon a promise, there are three things considerable, consideration, promise and breach of promise.'"[370].

As demonstrated by Simpson, Courts of Chancery were called courts of Conscience[371], and "If one had inquired of a late-fifteenth-century lawyer the appropriate title for a book on what went on before the court of Chancery, he would without doubt have said 'Conscience' not 'Equity.'"[372]. He proceeds to claim, "For to a fifteenth-century ecclesiastic, sitting as a judge of conscience, in a court of conscience, to apply the law of conscience 'for the love of God and in way of Charity,' 'conscience' did not connote, though it included, some principle of injurious reliance or good faith."[373]

One of the most allusive roles of the court of Conscience is brought to mind by Vinogradoff, citing a case tried in Chancery in 1467 where the Chancellor Bishop Stillington justified granting a subpoena by stating the maxim: "*Deus est procurator fatuorum*" (God acts as attorney to foolish people)"[374]. The route sealed by Henry VIII and the reformation to dissuade the use of Canon Law in England found the means to prosper in Equity. What is read on modern statutes as reminiscent of Equity is the English reception of Canon Law as discussed in Saint German's Doctor and Student.

Furthermore, the philosophical inclination on why individuals engage in contractual arrangements defines the nature of the exchange of resources. On Pollock citing Hobbes for the reasons why promises should be enforced it becomes visible the reason why prominent scholars found different rationales for the same rules: "It is really by a deduction from this that our Court have in modern times laid it down as an 'elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration.'(quoted from Westlake v. Adams

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370 *The rise of assumpsit*, p. 406, and also Simpson Innovation on contract law
371 *The rise of assumpsit*, p. 396.
372 *The rise of assumpsit*, p. 398.
373 *The rise of assumpsit*, p. 398.
374 Vinogradoff, Paul. "Reason and Conscience in Sixteenth-Century Jurisprudence." *LQ Rev.*, vol. 24, 1908, p. 373. Citation p. 380.

1858). The idea is characteristic not only in English positive Law but in the English school of theoretical jurisprudence and politics. Hobbes says: 'The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they contended to give.' (Leviathan, pt. 1, c. 15)" [375].

In a passage situated in Barbour in the History of contract in Early English Equity[376], he proposes the possible reasons for the change in parties' progressively abandonment of formal deeds entitling them to seek relief on writs: "*There were hosts of 'accords' and 'bargains' among people of humble life, who from ignorance or lack of means did not observe the technicalities of legal forms."*[377]. The growing use of contractual forms and the lack of professionals to perform the controlling task of maintaining the rigor and formality of contractual rituals, the increasing role of the courts of Conscience, and the reframing of contractual by Canon Law to mitigate the unavoidable change.

For the nineteenth-century jurists to uphold a rule of noninterference on questions of value manifested in the quality of the property as being disposable and therefore sold for "less than another would."[378]

As espoused by Gordley and Von Mehren: "*Traditionally, a promise was enforceable in assumpsit whether the consideration given in return was adequate or not. Courts of equity,*

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[375] Winfield, P. H. *Pollock's Principles of Contracts*, 12th ed. Stevens & Sons Limited, 1946. p. 136 and p. 242: "Express exceptions providing against such events as we are considering are usual in several kinds of commercial and especially maritime contracts. The terms of these exceptions, however, are archaic and general, and the Court has in substance to appeal to principle to settle their application."

[376] On discussing Barbour's 'The History of contract in Early English Equity' Simpson investigates the outcomes of lack of remedy under common law to justify the possible reasons for the action of assumpsit." Among the crucial observation Simpson's makes one is the following Simpson, A. W. B. *A History of the Common Law of Contract: the rise of the Action of Assumpsit*. Clarendon Press, 1987. pp. 277-278: "If Barbour's conclusions here are, as seems probable, at least in general correct, they throw an interesting light upon the development of assumpsit. For assumpsit, as we shall see, was developed in the sixteenth century by the common law courts so as to provide a remedy in just those cases where the fifteenth-century Chancery had come to provide a remedy in equity. The rise of assumpsit can thus be viewed not as a development which provided a remedy where no remedy previously existed, but rather as transferring to the common law courts jurisdiction over cases previously within the province of the Chancery."

[377] Barbour, Willard Titus. *The history of contract in early English equity*. Clarendon Press, 1914. p. 153.

[378] Story, William Wetmore. *A Treatise on the Law of Contracts not under Seal*. CC Little and J. Brown, 1844.

however, could give relief if a bargain was so harsh to be 'unconscionable.'"[379]. On the other hand, Simpson alluded to an archaic conception of a creditor's liability claim against the debtor while dealing with the writ of debt since it relied on a proprietary character (p. 75). Sustaining that opinion, Simpson cites the authority of Pollock, Maitland, and Barbour. (p. 28 Barbour: "Roughly speaking, the distinction was between obligation and property. Where the plaintiff's right was in *personam*, that is, where he was enforcing an obligation to pay money or where he was enforcing an obligation chattels, the proper remedy was debt.[380]"

However, every settled doctrinal controversy gives rise to remains of a murky past that recognizes secularized values encysted (Santner) on theological conceptions.

In England, a veiled quarrel between the jurisdictional limits between ecclesiastical and common law courts was groomed until Herny II issued the Constitutions of Clarendon [381], occasion in which the common law courts "*resisted firmly any attempt upon the part of ecclesiastical courts to encroach upon the law of contract*."

The church, despite losing some of its powers, still had knowledge and tools to soften the harshness of the law. One solution adopted by the common law courts was to use the price disparity as evidence of fraud or hardship, instead of examining the fairness of the exchange. According to Simpson's Horwitz thesis (p. 569), the change was in the theoretical ground upon which inadequacy operates, as evidence of fraud and not as an independent, substantive ground or as constituting "hardship."

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[379] An Introduction to the Comparative Study of Private Law: reading, cases, materials, Cambridge, 2006, p. 466.

[380] Barbour, Willard Titus. *The history of contract in early English equity*. Clarendon Press, 1914. p. 28.

[381] For a comprehensive account on 'the Constitutions of Clarendon' see Pollock and Maitland, The History of English Law: Before the time of Edward I, Vol. I, 1968, Cambridge: at University Press, pp. 137. The Clarendon Constitutions were a set of laws and policies enacted by King Henry II of England in 1164 designed to restore royal authority and reduce the power of the Church in England. In terms of contract law, the Clarendon Constitutions had a significant impact on the development of the common law. The laws aimed to increase the power of the king over the Church by regulating the use of writs, which were legal documents that gave the king's court jurisdiction over certain types of disputes. The Clarendon Constitutions also established the principle of "common right," which meant that the king's court had jurisdiction over all disputes, regardless of whether the parties were members of the Church or not. See also Simpson, the rise of assumpsit, p. 145

In determining enforceability of a promise, courts first evaluate the presence of consideration, which does not necessarily require equality in exchange. Consideration can require performance and bilateral fulfillment of obligations before the other party can raise a defense or claim relief for a dishonored promise. The debate surrounding fairness and justice in contractual relationships, as well as the influence of the economic setting on the treatment of prices, has generated one of the most fruitful discussions in the understanding of contracts.

When parties dispute the fairness of the promises made and their respective equivalents, the doctrine of unconscionability must be activated to prevent the enforcement of unfair bargains, a subject heavily debated to assert the prevailing jurisdiction, temporal or heavenly.

The notion of the distributive aspect of exchange as a justice preoccupation oscillates over time. Establishing which values are equivalent without depleting or causing a loss to the other party depends on a theory of values within itself. Even if it is still considered that a contractual relationship presupposes the exchange of equivalent values, there are many reasons why parties engage in a transaction, not necessarily seeking an economic advantage. A substantive part of the theory of consideration under case law accepts the contractual transactions for the donations of gifts or promises for rewards later enforced before the courts.

The exchange of gifts contains a symbolic dimension, and those who advocate for a linear theory of circulation from barter to currency exchange to modern capitalist economics ignore how mystical rituals and their role in society play a fundamental role in why someone enters a transaction. Modern contractual theory suppressed the "weight of all flesh"[382] on contractual transactions, a twist that, on the one hand, facilitates the dissemination of a

[382] A passage referring to the Merchant of Venice in Santner, Eric L., et al. *The weight of all flesh: On the subject-matter of political economy*. Berkeley Tanner Lectures, 2016. p. 55: "The puns in the play function as sites where, as it were, the word becomes flesh and the flesh becomes word—sites where words themselves come to assume the status of "partial objects." The pound of flesh finally offers us the figure of a value that can be extracted—or perhaps better, materially abstracted—from a living body and weighed in the balance. What is weighed here is, however, no longer that which makes a king a king—the partial object of political theology—but some- thing in or of the body that has been invested not with royal office but with economic value in a mercantile society."

secularized doctrine of capital but also negates a parallel offered by Mladen Dolar's analysis of Shakespearian Merchant of Venice in a sense that mercy opens an "absolute debt" since gifts "indebt."[383] To apply a theory of justice in transactions disregards that an act of altruism does not accompany giving one's portions of wealth in the world.

The Aristotelian division of commutative and distributive justice goes beyond the act of giving claim values and expectations the Law cannot measure. In Dolar's remarks, "[m]ercy is a usurer which, by not demanding a circumscribed surplus, opens an absolute debt. It demands not an 'equal pound of flesh', but an 'equal pound of the soul'[..]". Perhaps by inquiring about parties' motivations for entering an agreement, one will find why the courts were reluctant to embrace a theory of fairness within the Law, recognizing that it was just in the sixteen and seventeen centuries that the humanists detached contractual theory from previous canonical constraints. In the limbo between a religious conception of fairness and the mathematical development allowing gains and losses to be objectively assessed.

Also, since numerous controversies arise from unfair bargains, the Law provided instruments receiving different denominations and deployed in manifold contractual agreements across juridical systems: lésion, duress, hardship, take-it-or-leave-it, oppression, conspicuousness, inequality of bargaining power, the german Wucher could be assembled under this broader taxonomy of remedial devices for courts' "refusal to enforce a gross disparity."[384]

Arthur Allen Leff proposed in his 1967 Unconscionabilityarticle that the unconscionability clause contained in the U.S Uniform Commerical Code section 2-302

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[383] Dolar, Mladen. "The Quality of Mercy Is Not Strained." *The Yearbook of Comparative Literature*, vol. 60, 2014, pp. 9-26.

[384] Murray Jr, John E. "Unconscionability: Unconscionability." *U. Pitt. L. Rev.*, vol. 31, 1969, p. 1.

represented a pathology[385]. He stated that "Equity dealt with the pathology of bargaining. The Code deals with the pathology of nonbargaining."

Leff's criticism of the clause regards its excessive abstraction, a conclusion that he carries out after analyzing the drafting process of sections 2-302 of the Uniform Commercial Code. As he recalls the stages of contract celebration, he defines contractual engagement as a "ritual of incantation."[386] A promise presupposes fulfillment, and defenses function to object carrying them out. Along with his argument, he raises a fundamental distinction between procedural and substantial unconscionability, a distinction disregarded by the code's drafters. He proceeds to disclose a tension on the challenges of contrasting " that is categorized under a fit all criteria for its indistinct nature of substantial or procedural. His blatant criticism against the provision states that "it is easy to say nothing with words"[387] since he divides the role performed by Equity and by the common law. His criticism illustrates the challenges of incorporating a general provision of fairness on contractual terms.

According to Black's Law Dictionary, unconscionability corresponds to "gross overall one-sidedness or gross one-sidedness of a term disclaiming a warranty, limiting damages, or granting procedural advantages."[388] The Uniform Commercial Code and the Restatement of Contracts allow the Court to refuse to enforce a contract made under unconscionable terms. The etymological roots of the word conscionable allude to the idea of having consciousness, and the role of consciousness in contracts implies the notion of a subjective bound connecting the parties entering an agreement. Besides, the courts of Conscience were the cradle by which heterodox theories to circumvent contractual harshness were nourished[389].

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[385] Leff, Arthur Allen. “Thomist Unconscionability.” *Can. Bus. LJ*, vol. 4, 1979, p. 424. In the opposite direction see Ellinghaus, M. P. “In defense of unconscionability.” *Yale LJ*, vol. 78, 1968, p. 757. Related to his discussions see Hale, Robert L. “Coercion and distribution in a supposedly non-coercive state.” *Political science quarterly*, vol. 38, no. 3, 1923, pp. 470-494.

[386] Ibid Leff.

[387] Ibid Leff.

[388] *Black’s Law Dictionary*, 1990, 6th ed. St Paul, Minn, West Publishing, 1524, 1525.

[389] Spence, George. *Equitable jurisdiction of the Court of Chancery*. Lea and Blanchard, 1846. p. 410: “The term Conscience as denoting a principle of judicial decision, appears to have been of clerical invention; it seems to

As the meaning already inferred, the notion presupposes a will theory on contractual formation since if parties' intentions were disregarded entirely, courts would have no subsisting reason to refuse the enforcement of a biased contract. As Roscoe Pound masterfully exposed in the Role of Will in Law, drawing also on Collinet's findings on Greek contractual roots in the Roman period, assessing the mental state of individuals was a pursuit perceived as impossible by the Law[390]. The external elements were the indications for judges to distinguish diverse forms of agreements, "*verba, literae, res*." As stated by Pound, "*A general will theory of the science of law- a general reduction of everything to the manifested individual will - got currency in the eighteenth and fore part of nineenth century*."[391]

Pound poses the following question, "should a court refuse to enforce a hard or unfair bargain or should it require the hardship or unfairness to be coupled with some degree of deception or mistake?" Once the juridical system freed subjects to exercise their will, those new problems emerged. How could courts adjudicate parties' original intentions? To solve the puzzle, late eighteenth and early nineteenth-century schools of thought denied such a possibility. According to Pound's explanation: "The Roman jurists, the Pandectists, and Anglo-American courts of equity were troubled by these questions, and their determinations were governed largely by the weight accorded to the security of transactions." (the role of will, 14).

The moment in which the French Code precept "agreements legally formed take the place of law for those who made them" (Code Civil, art. 1134 original version before Ordonnance n°2016-131 du 10 février 2016 - art. 2) reached its pinnacle overlapped with *pacta sunt servanda*'s growing challenges[392]. Reinforcements on this provision spread

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have embraced the obligations which resulted from a person being placed in any situation as regards another that gave to the one a right to expect, on the part of the other, the exercise of good faith towards him; and nearly resemble the bona fides (c) of the Praetorian Code, as illustrated by its various commentators."

390 Pound, Roscoe. "The role of the will in law." *Harvard Law Review*, vol. 68, no. 1, 1954, pp. 1-19. Collinet, Paul. "The evolution of contract as illustrating the general evolution of Roman law." *LQ Rev.*, vol. 48, 1932, p. 189.

391 Pound, note 135 at 4.

392 A Concise History of Common Law in England. Plucknett makes a convincing statement on the contractual nature of contractual state theory beginning with Machiavelli, asserting, p. 41: "It was medievalists in England,

throughout the Code, as article 1118 refused *lésion* as a general principle[393], acclaiming the precept that contracts create rules for their parties. Objections softened the rigors arising from codification spirits. Napoleon rebuked agreements for selling land below the line of a seven-twelve proportion value to market price since that implied a chain of reactions affecting inheritance law needed to be addressed.[394].

Since the nineteenth century, jurists have sustained defiance against the fairness of an exchange. The conciliating theory gravitated to issues of fraud instead of questions of value[395]. As professor Gordley correctly observes, autonomy constituted almost a corollary for those defending the value as subjective and incommensurable for assessing the fairness of values exchanged[396].

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armed with Bracton and the Year Books, who ended Stuart statecraft, and the Constitution of the United States was written by men who had Magna Carta and Coke upon Littleton before their eyes. Could anything be more mediaeval than the idea of due process, or the insertion in an instrument of government of a contract clause? *Pacta sunt servanda*, it seems to say, with the real mediaeval accent." See also Pollock, Sir Frederick, and Maitland, Frederic William. *A History of English Law: Before the time of Edward I*, vol. II. Cambridge University Press, 1968. p. 196: "In Germany and in northern France the old Teutonic formalism was but slowly undermined by the new principle, and in one and the same book we may find the speculative *Pacta sunt servanda* lying side by side with the practical demand for formalities." See also Albuquerque, Juan Miguel. *La protección jurídica de la palabra dada en Derecho Romano: contribución al estudio de la evolución y vigencia del principio general romano pacta sunt servanda en el Derecho Europeo actual*. Universidad de Cordoba servicio de publicaciones, 1995. p. 16-17: "La apreciación inicial che nos lleva a considerar el pactum como un acuerdo para establecer la paz puede avalarse desde un punto de vista etimológico. Según Ernout-Meillet, de la raíz *pak*- alternando con *pag*- deriva la palabra *pax*, y a esta misma raíz pertenecen las formas antiguas *pacit pacunt*, del verbo *pacere*, usadas en las XII Tablas. Parece, pues, que cabría afirmar que el sustantivo paz vendría a indicar desde sus orígenes ante todo, principalmente, el cese de un estado de hostilidad, la actividad a través de la cual, por vía convencional, se determinaría la no beligerancia. El argumento etimológico ha sido utilizado por gran parte de la doctrina romanística. Uno de los autores más gráficos a este respecto es Biondi, según el cual se puede admitir que el término *pactum*, conforme a la derivación de *pacisci*, originariamente significaría hacer la paz, es decir, poner fin a un conflicto. En el mismo sentido, para Fuenteseca el *pactum* es un acuerdo privado entre dos sujetos para establecer la paz entre ambos. El hecho de que el término paz se relacione con el de *pacisci* (concluir un pacto) sugeriría, según Zampaglione, que la idea expressa indicasse una condición exenta de conflictos, determinada por un encuentro de voluntad. *Pax* venía, en efecto, a significar o bien un cierto estado de relación existente entre dos o más sujetos, o bien el acuerdo mediante el cual era alcanzado. La concepción etimológica lleva a Perozzi a afirmar, partiendo de la idea de que pactum deriva de pacere, que equivale a hacer la paz, que originariamente sólo puede significar que dos grupos políticos en estado de guerra concertaban la paz."

393 Gordley, equality in exchange, p. 1543 Gordley equality on exchange

394 Professor Gordley, equality on exchange, p. 1593-1594, article 1674 established a seven-twelve proportion criterion for *lésion: "*Si le vendeur a été lésé de plus de sept douzièmes dans le prix d'un immeuble, il a le droit de demander la rescision de la vente, quand même il aurait expressément renoncé dans le contrat à la faculté de demander cette rescision, et qu'il aurait déclaré donner la plus-value"

395 Gordley, equality on exchange, p. 1599.

396 Gordley, equality on exchange, p. 1600.

Professor Perillo, in an article discussing the objective theory of contracts, sustains that differently from what Horwitz supported in his Transformation of the American Law (debunked by many scholars opposing the view that prior to the nineteenth century, there was in vogue a subjective theory of contract replaced by a market-oriented objective one), evidence rules and the advancement of that field propitiated an incursion into more subjective states of mind).

Those two articles offer relevant insights into how juridical understanding embraced the more advanced theories the rules of evidence and economics provided at the beginning of the 20th century. On the one hand, fair price became a measurable variant that optimal curves could provide. On the other, the insertion of evidence rules connected the facts surrounding the contracts parties' entered with the jury and judges to assess the surrounding reality that parties were conveying.

The better capacity to evaluate states of mind and the progressive advancement of the Law offered more detailed questions and answers that consolidated the formation of precedents in distinguishing the array of situations possible to arise when a party feels harmed by unfair constraints. Furthermore, by considering what parties are seeking when entering a contract, courts were able to distinguish a situation altering contractual equations and the core of fundamental breach, affecting the very reason why an agreement was celebrated, as it happened while deciding the coronation cases (Krell v. Henry, 2 K.B. 740 [1903]. Foundational came to be understood as reasons that if absent empty the reason why literal perfomance must ensue.

Contractual development affirmed the will theory role because it devised juridical relationships untied from previous servitude constraints in that secured transactions and disregarded the status held by the individual as the central aspect of trustworthiness[397].

[397] Simpson on *The Rise of Assumpsit* observes that liability was sought based on status and not on transactions parties' entered, pp. 206-207 and 227.

Grotius and Pufendorf considered will as an element of possession, albeit sustaining different positions on the state of original natural rights[398]. It provided facilitation of the growing commerce of goods' exchange, conferring speed to protocolar and traditional patterns of concluding contracts. Shifting forms toward effective remedies liberated contractual arrangements[399]. In Pound's words, "this idea readily passed into one of free individual self-assertion and self-assertion in a world abounding in undiscovered resources, undeveloped lands, and unharnessed natural forces."(p. 8, Pound the role of will). It constituted a further passage of containing in primordial means the exercise of sovereign power since if the Law leaves a space for private adjustment in contractual relations, it already concedes a space in which the sovereign cannot rule.

Private agreements achieved legal stature between parties as much as constitutional documents constituted citizens' State guarantee. While property ensured sovereign respect towards baronial subjects, indulging kings to respect property owners, the formation of a subjective contractual theory elevated a broader contingent of persons to enjoy the benefits of credit circulation and community exchange.

Whereas property rights were framed in a more rigid structure, requiring centuries to evolve into a list of property rights, contractual arrangements became uninhibited for invention. Furthermore, the fragmentation of property rights into multiple categories made it so that just a few individuals could enjoy property rights in their wholeness while the majority should be satisfied with fractions of property rights.

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[398] Schlatter, Richard. *Private property: The history of an idea*. Allen & Unwin, 1951. See Schlatter, *Private property: the History of an idea*, on John Salter, Hugo Grotius: property and consent.

[399] See Pound, Roscoe. “Individual Interests of Substance: Promised Advantages.” *Harvard Law Review*, vol. 59, no. 1, 1945, pp. 1-42. p. 10: "The English trader and entrepreneur were not seeking for legal instruments. They could work passably with those which the Law furnished of the Law would but let them. What they sought was to be free from legal shackles which had come down from a society of a different nature, organized on a different basis and with other ends."

As McIlwain states: "to the kings belongs authority over all: to private person property,"[400] apud Pluckenet: a concise history of the common Law, p. 37. Granted that the exercise of property rights opposed the deployment of unchecked violence on the sovereign's behalf and epitomized the first effort to elevate parties above their feudal ties, it was with the theories on natural rights promptly applied to contractual relations to promote a significant shift for bourgeoise ascension. And even though the first baronial commitments were incipient for forming a society based on transactions stipulated by free individuals, defining the roles of every subject in an emerging societal organization allowed contracts to reemerge.

Additionally, the impact of the 14th-century plague that caused massive deaths allowed the fewer remaining peasants to resettle in burgs and towns and freely exchange their scarce labor[401].

The nascence of a more transactional society generated an influx of agreements. Also, it increased the number of breaches occurring, expanding the overlapping correlation between writs and available remedies, especially in the local courts.[402]

The need to elevate the nature of contractual obligations as endowed with a sacrosanct nature justified a limited, if not nonexistent, space for breaches and excuses for nonperformance for this first stage of contractual foundation. *Pacta sunt servanda* functioned

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[400] McIlwain, Charles Howard. *The Growth of Political Thought in the West: from the Greeks to end of the middle ages*. The Macmillan Company, 1932. p. 394: If I were asked which of the famous maxims into which the political thought of the world has at times been compressed is the one which on the whole best comprises the living political conceptions of the later middle ages, my choice, I imagine, would be rather unexpected, and not in all cases accepted, but it is one which my study of this period makes me willing to defend. It is the aphorism from Seneca's De Beneficiis, "As Reges enim potestas omnium pertinent: ad singulos, proprietas'—too king belongs authority over all; to private persons, property." Mcilwain in this magnificent genealogy of political thought in the West presents a surprising, yet compelling choice for the most encompassing political conception of the later Middle Ages. After extensive study of this period, Mcilwain argues that the aphorism from Seneca's "De Beneficiis," "Ad Reges enim potestas omnium pertinent: ad singulos, proprietas" - "For to the king belongs authority obnm344ver all; to private persons, property" - is the maxim that best summarizes the political thought of the time. This assertion may not be universally accepted, but Mcilwain's rigorous examination of the period leaves him confident in his defense of this conclusion.

[401] Palmer, Robert C. *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law*. Univ of North Carolina Press, 2000. (Bobbio 1993).

[402] Stoljar, Samuel Jacob, et al. *A history of contract at common law*. Australian National University Press, 1975. p. 4.

as a longstanding premise for undressing agreements, a twist towards secularized promises. In English jurisprudence, Paradine v. Jane, 1647[403]. Doctrinal endorsement of good faith while adjudicating contractual clauses was a work developed by the German pandecist school that embraced the subjective nature of human interactions in all fields of Law. A clash of parties' intentions and dispute adjudication paved the way for refining theories of consideration on the exchanged values since multiple elements interact to assess the content of parties' exchanges. If validation of contractual forms were not rigidly fulfilled in advance through forms and seals, the moment to determine contractual content and fairness was dislocated to issues arising of frustration and breaches in general.

One ignored aspect concerns the description of a contract. A contract "is not a signed document. The document is merely the evidence of the contract which may only partially reflect the totality of mutual assent."[404]. That statement must be internalized to meditate upon the content of the promises the parties exchange and distance oneself from contracts as an "automatic, self-regulating process."[405] There is a fine line between unconscionable terms and take-it-or-leave-it contract situations since, as they are litigated in court, those terms will manifest their "Delphic nature"[406]under case law and statutory provisions, on an inconsistent range of definitions ranging from "hardship," "conspicuousness," "equity and good consciousness" and so forth.

Even though much of the literature on unconscionability refers to the draft and enactment of unconscionable definitions for the U.S. uniform commercial code and the Restatement of Contract Law, tracing the origins of its discontents is more critical than ever. Breaches are on the brink of occurring in every situation, and the distinction among them is

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[403] Trietel, Guenter. *Frustration and Force Majeure*. Thomson Sweet & Maxwell, 2014. p. 19, Paradine v. Jane was the authority to justify absolute contracts and a strict judicial contract interpretation.

[404] Murray Jr, John E. "Unconscionability: Unconscionability." *U. Pitt. L. Rev.*, vol. 31, no. 1, 1969, p. 6.

[405] Unconscionability John E. Murray Jr., p. 28: "There is no freedom of contract in the equal treatment of unequals."

[406] Unconscionability John E. Murray Jr., p. 02.

shadowy for two reasons. First, it will be assessed just in case perfomance is not the natural outcome of the contractual relationship since parties discuss the meaning of their obligations. Secondly, deciding on unconscionability is a task for the judge that a party presents to oppose fulfilling their obligation[407].

In England, good faith was adopted in the Court of Equity, and in the United States, before Holmes, Langdell, and Williston, there was no Law concept of Contract[408]. Regardless of the anecdotal passage on why the American model was yet to be destined to be the epicenter of legal traditions, the spirit inspiring the draft of the first American Restatement of Contract Law bore strong influence by the certainty codification provided to the system. Additionally, Perillo, in his study on the letters exchanges between Corbin and Brauches, showed strong evidence of Restatement's drafters' need to incorporate parties' intentions and to promote more legal certainty to the Law of Contrats**.** The American model replicated in the Second Restatement of the Law of Contracts was also inspired by the European codification experience [409]. However, in a contradictory move to achieve codification legal certainty, the Restatement also incorporated the principles-oriented dynamic influx, recognizing that no system can fill all the void rules leave. Unconscionability is one of those examples in which principles demonstrate the vague margins in which parties exercise their remedies and defenses[410].

Pothier carried forward the Roman conception of supervening impossibility for justifying the extinction of an obligation, deploying the generic expression of *casus fortuitus*.

As a result, the French legal tradition embodied a system that would spread worldwide in the following century, demarking the era of codes and juridical certainty provided by those

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[407] Unconscionability John E. Murray Jr., p. 39.
[408] See Costantini, p. 255, Perillo 1993.
[409] Perillo, Joseph M. "Twelve Letters from Arthur L. Corbin to Robert Brauchers Annotated." *Wash. & Lee L. Rev.*, vol. 50, 1993, p. 17.
[410] Gordley, James. "European Codes and American Restatements: Some Difficulties." *Columbia Law Review*, vol. 81, no. 1, 1981, pp. 140-157.

documents. The 18th-century paradigm of frustration in the continental tradition was consolidated in the French model[411].

The juridical doctrine found on the theories of fairness of exchange a conciliatory venue between consideration as an analytical category present in contractual exchanges and the justification for disregarding forms on bargains. As Arthur Allen Leff commented on the drafting of the U.S Uniform Commercial Code (2-302), for solving the tensions arising from meddling procedural and substantive grounds, novel abstractions were constructed, comprising the one of "adhesion contracts."[412]

It is no coincidence the growing preoccupation with the fairness of the bargain replaced ritualistic tasks, leaving the space to be filled with the introduction of values to the contractual equation.

A clear example of the phenomena is the interpretation provided for gifts[413]. Among the inquiries for observation is to glimpse the circumstances in which a promise to make a gift would be enforceable. A pledge to make a gift, if not followed by an instrument, leaves no indication of the binding nature of a promise.

Moreover, the limitations on making a gift present in later codifications constituted evidence of the risks of simulating an unequal exchange. In that regard, good faith and fairness entered the doctrinal discussion as means to investigate the nature of agreements and validate their operations at a very early age of the Law, as stated above.

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411 Roy McElroy, 1941, pp. 3-4.

412 See Leff, p. 504.

413 Dawson, John P. *Gifts and promises: continental and American law compared*. Yale University Press, 1980. p. 213. An elementary difference between gifts and promises lingered in paramount Dawson's construction. While gifts are voluntary transfers of property without any expectation of return, promises to perform the role of binding obligations that are enforceable in court. Dawson's work has also influenced the development of contract law by emphasizing the importance of consent and consideration in the formation of a valid contract. His argument on contracts based on a meeting of the minds, presupposing parties' voluntary agreement to the terms of the agreement, helped clarify the principles of offer, acceptance, and consideration, which are fundamental to forming a contract. Furthermore, Dawson's ideas about gifts and promises have also been influential in shaping the development of the law of estoppel, helping to elucidate the circumstances in which a promise can give rise to estoppel. See also Farnsworth, E. Allan. “Promises to Make Gifts.” *The American Journal of Comparative Law*, vol. 43, no. 3, 1995, pp. 359-378.

The clash between *stricti iuris* and *bonae fidei* found a solution in Pothier, for whom the distinction should disappear in favor of a unitary contractual system. Pothier's development, already in formation by the hand of the humanists, paved the way for refining a theory on frustration[414].

In English Jurisprudence, whereas Jane v. Paradine refuted excuses given for the nonperformance of a lease, Taylor v. Caldwell introduced a shift in the treatment of excuses. The pervasiveness of admitting reasons for exiting an agreement and entering the terrain of fairness expanded as the former constraints could not solve juridical disputes.

Atiyah, while developing his thoughts on the effects of abolishing the doctrine of consideration, points out unexpected results arising from the demise of consideration:

> "*It is not, however, pure paternalism that raises doubts about the possibility of making gratuitous promises enforceable. Such a proposal involves other problems which have rarely been discussed in our legal literature. Making gratuitous promises enforceable does raise problems about the relationship of such promises to other types of contracts. On the whole, English contract law seems to be framed on the supposition that most contracts are bargains, and its rules are not wholly appropriate for gratuitous promises. For instance, excuses for non-perfomance (as we shall see later) are very narrowly confined in the present Law, and it is not clear that it would generally found fair to treat gratuitoys promises quite so strictly*.[415]"

[414] Atiyah, P. S. *An Introduction to the Law of Contract*. Clarendon Press, 1989. p. 15 (doctrine of frustration): "The very development of the law itself during the latter half of the nineteenth century profoundly affected the importance attached to the agreement and intention of the parties. It remained true, of course, that contracts were usually created as the result of agreement, although as we have seen the objective approach to questions of agreement and intention gradually became stronger. But far more important than this was the fact that as the rules relating to contracts were elaborated, the sheer complexity of the law grew such that the theory that most of the rules were based on the parties' intentions became more and more a transparent fiction. The doctrine of 'frustration' may be taken to illustrate this tendency. Under thus doctrine a contract may be treated as extraordinary event occurring without anybody's fault." See also BUCKLAND, William Warwick. Casus and frustration in Roman and Common Law. *Harv. L. Rev.*, 1932, 46: 1281: "*In 1802, in his great work on Obligations, systematizing developments in France, Pothier produced a unitary system of contract with the distinctions between stricti iuris and bonae fidei transactions suppressed, and a set of rules constructed by choosing what seemed to him good from both Roman systems"* Casus is a Latin term meaning "case" or "occurrence," and refers to an unexpected event that affects the performance of a contract. Frustration, on the other hand, refers to a situation in which the performance of a contract becomes impossible, impractical, or is fundamentally altered due to the occurrence of an unforeseeable event. In this article, Buckland compares and contrasts the Roman and Common Law approaches to casus and frustration, and analyses the evolution of these concepts over time.

[415] An Introduction to the Law of Contract, p. 160.

For Atiyah, it would inevitably leave a broader space for inserting considerations of fairness and justice, a point from which the author departs to discuss the overcoming of express contractual provisions. In that regard, the divide separating substantive justice and the sanctity of contracts fluidifies into a more equitable-oriented equation of exchange. However, without hindering the "crude species of lying and forcing," contractual defenses prevent the exercise of violent means of compelling obedience[416].

For that reason, better scrutiny between defenses of freedom and information allows for creating the Court adjudication on the medieval fair price doctrine. A closer observation of the implications of frustration arises from whether or not courts should adjudicate the promises one has made and their capacity to predict unforeseen events.

A case constructed in this way was Staffordshire Area Health Authority v. South Staffordshire Waterworks Company: CA 1978[417]. In Waterworks, the Court ruled that the contractual clause "*At all times hereafter*" for the delivering of water to a hospital was understood as "terminable by reasonable notice" after almost 50 years passed without price readjustment, making the price for the water service to fall to 1/20 below market value[418]. And even though the rationales are different when approaching force majeure events, the justification for judicial adjudication of contractual equilibrium coincides, excusing the performance of the obligation[419].

Chitty on Contracts provides[420] that legislative policies shall interfere in the freedom of contracts to protect the disadvantaged, as happened under the Unfair Contract Terms Act 1977. From that perspective, the inference that equitable relief must ensue for occurrences harming

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416 Thomist unconscionability, Arthur Allen Leff, 1980.
417 [1978] 1 WLR 138, [1978] 3 All ER 769.
418 Carey, Blake. "Is a Judicial Discretion Needed to Soften the All or Nothing Nature of the Doctrine of Frustration?" *Pub. Int. LJNZ*, vol. 2, 2015, p. 75.
419 Trietel, Guenter. *Frustration and Force Majeure*. Thomson Sweet & Maxwell, 2014, 12-025, p. 475: "It has, on the contrary, been said that 'the scope allowed in force majeure is far narrower than that of frustration in English Law."
420 Point 537.

contractual equilibrium prevails over the definitive nature of a given promise. The reasoning following decisions that circumvented the rigidity of *pacta sunt servanda* regards finding implied terms or a promise made under a mistake, or an unexpected event, among other legal excuses for frustration. The attachment to the doctrine of consent is so heavily embedded in the legal culture that the development of the theory of exemption requires the creation of fiction to allow the courts to assume a more dirigiste role[421]. And even though force majeure is not an exemption clause, they produce the same effects[422].

Indeed, the definition of an unforeseeable event comes from first defining the foreseeability of that event[423].

Atiyah offers a classification that distinguishes agreements contrary to public policy, courts' voiding of penalties and forfeitures (mortgages and The Merchant of Venice), and the unconscionability arising from inequality of bargaining power. As Buckland asserted in his Casus and Frustration in Roman and Common Law, "*Bonae fidei* notions have practically ousted those if *strictum ius*," and that prevalence of *bonae fidei* over *strictum ius* justified is manifested in the attention the BGB dedicated to good faith.

That statement synthesizes a conceptual framing developed by Machiavelli and perfected by later scholars on the theory and conceptualization of the word "State." The leap in the relationship between subject and ruler was profound. It allowed for the separation between the Private and the Public realms, an unconceivable idea for a society ruled by the laws of God. Observing the separation between private and public relies on two aspects. First, the differentiation enabled Private Law to unburden itself from the challenges involved in the formation of nation-states, a field in which a considerable number of scholars were occupying their inquiries. On the other hand, it allowed for the consolidation of novel principles and the

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421 Chitty on Contracts, 1989, 26ttg edition, point 537 following addressing duress, p. 361.
422 Point 944 Chitty on Contracts.
423 Chitty on Contracts, point 1646, p. 1027.

exercise for the parties of previously unexistent freedom to transact. The "mutuality requirement" described by Chesire and Fifoot establishes under the doctrine of consideration a novel premise that economic exchange predominately gains on transactions[424].

In French Law, the original language from article Article 1148 of the Code civil stated that "*Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit*."

The article bear its foundation on Pothier's justification for debtor's release from their obligation. Article 1218 replaced former 1148 to provide the following:

> "*Art. 1218. - In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the Contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the Contract. If the prevention is permanent, the Contract is terminated by operation of Law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1*[425]."

According to the reformed provision, following force Majeure's conceptualization, the Code Civil establishes a distinction between permanent and temporary frustration. It states that if the prevention to fulfill the promise is temporary, the perfomance is suspended, and if definitive, it justifies termination. Force majeure reinstatement affected how parties and the judiciary adjudicated unforeseen circumstances. It introduces changes affecting the original civil and common law respective conformations, bringing the Roman Law roots into the civil law tradition inclined to long-duration contracts, in which the changes of events become more likely.

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[424] Criscuoli, Giovanni. *Il contratto nel diritto inglese*, 2nd ed. CEDAM, 1990. p. 41 and also *Nuova introduzione allo studio del diritto inglese: le fonti*, 4th ed. Giuffrè, 2016.

[425] French Civil Code, Art. 1218.

The reform marks a distinction that McElroy defines as a Roman Law emblem, that of the "*supervening impossibility of perfomance operated to extinguish an obligation*"[426]. He used to confront the French framing of force majeure institutions and the English attitude toward frustration distinguishing from Paradine v. Jane, the duty created when the party creates a duty or charge upon themselves is not excusable.

This remarkable passage on English jurisprudence deconstructs Horwitz's contract *bon sauvag*e preceding 18th-century contract theory, stating that capitalism and the increasing need for order in contractual relationships inflicted upon parties an unyielding commitment to promises, making them strictly enforceable[427]. In his lectures entitled The Death of Contract, Grant Gilmore also embraces the view of a previous order of the contractual formation flustered with contractual judicial adjudication. However, while Horwitz draws attention to fairness and justice, positioning the judicial role as positive, Gilmore takes the opposite view since his thinking is oriented towards the importance of the party's autonomy as a space for exercising a will not relying upon government intromission on subjects affairs.

The importance of discussing a contractual paradigm pre-industrial revolution relies on orienting the effects following the Classical Theory of Contract[428]. A reverse-direction approach will alleviate the apparent contradictions in the previous contractual freedom stage illusion.

In reality, disregarding parties' agreement to favor fairness, justice, and the public policy domain does not collide with consent’s fabrication. Defenses and exceptions reemerged for founding the contractual legal basis on allocating risks in the exchange of values in a secularized theological discourse. Therefore, the apparent breach of God's precepts in the

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[426] Under impossibility of Perfomance, p.3.
[427] Horwitz, *The Transformation of American Law*, 161-210.
[428] Costantini, Cristina. “The unburiable contract: Grant Gilmore’s discontinuous parabola and the literary construction of American legal style.” *Comparative Contract Law*, edited by Pier Giuseppe Monateri. Edward Elgar, 2017, pp. 245-302. p. 281.

rediscussion of a given promise does not lead to the conclusion of contractual basis collapse or sufferance of a deadly condition. It leads to the need for a novel device for risk calculation[429]. Instead, humanists' invention of juridical subject freedom to Contract constituted an invention that only God intervened to disrupt. In that regard, the doctrine of frustration, force majeure, and hardship clauses anticipating unforeseen events assumes a complexion of endorsement and not denial of contractual theory. As much as for every right, a remedy is required. For every attack, a suitable defense must ensue. The exceptions are born within the limits of the Law.

The liberation from Constitutional Law from the burdens of categorizing all relationships under a property entitlement defined the feudal order and a first step to commence the process enabling the Public and the Private to engage in different dialogues. At the same time, it also conferred to state formation of a contractual language displaying entering agreements through will manifestation as the new paradigm for human relationships.[430]

However, the analogous state of exception under Constitutional ruling offered a token by which the communal agreement is suspended and will also apply to contractual obligations. In the case of contracts, Acts of God suspend the continuity of parties' will. Those unpredicted events, heavenly produced or not, affect the quality of promises exchanges since it impacts the balance between parties. Powell already categorized them as "exceptions in commercial contracts"[431]

The insertion *force majeur*e borrowed from the French tradition and disseminated across multiple jurisdictions without translations has the pursuit of amplifying the intent of the doctrine of frustration since unforeseen occurrences affect the sanctity of contracts *pacta sunt servanda* principle in a construction remounting Taylor v. Caldwell. In the optics of Legal

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[429] Stojlar, *A History of Contract at common law*, 1975, p. 34: "Contract thus assumed an entirely new role. It now had to serve as the legal basis for predictable calculations, for economic or commercial planning, instead of being as it had hitherto mainly a vehicle for the exchange on credit of goods or services. We shall see hov the Law adapted itself to this role."

[430] Atiyah, P. S. *Promises, Morals, and Law*. Clarendon Press, 1981. p. 12.

[431] Pollock's Principles of Contracts, 12th edition, 1946, Stevens & Sons Limited, p. 242.

History, it is notable that the spread of French codification prestige reached the common law domain.

A paradoxical aspect of the Common Law relies on the necessity of certainty when approaching parties' agreements. The same tradition enabled the creation of courts of equity by the Chancery to soften the rigidity of the available remedies. The common Law and Equity amalgamation favored the emergence of trusts, the most remarkable Equity institution[432].

As juridical science evolved, equity matured into a variety of institutions, depending on the jurisdictional context in which it would be assimilated. Whereas Canonical influence stressed the importance of good faith and obedience to God's commands, England's maintenance of courts of equity until the merger of equity and the common law courts through the Judicature of Act of 1873 allowed for the development of an idiosyncratic understanding of the Law of Contracts. To mitigate the harshness of *pact sunt servanda* and the principle of the sanctity of contracts[433], the doctrine of frustration and *force majeure* came as instruments to allow the distribution of losses on an equal-base proportion[434]

The doctrine of frustration softens the rigidity of forms of action[435]. It was jurisprudentially developed with the advent of Taylor v. Cadwell, where the Court recognized that the parties must share the losses arising from the impossibility of performing an agreement. Therefore, with Taylor v. Cadwell under English Law, the Court broadened the scope of frustration, allowing for the development of the doctrine of impracticability. Before, with the precedent of Jane v. Paradine, frustration and impossibility of fulfilling one promise in English

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[432] Cheshire, G. C.; Fifoot, C. H. S. "Central London Property Trust Ltd v. High Trees House Ltd." *LQ Rev.*, 1947, p. 8.

[433] For a recent account see Waddams, Stephen. *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment*. Cambridge University Press, 2019. p. 118.

[434] Trietel, Guenter. *Frustration and Force Majeure*, 3rd ed., p. 222, making the distinction between the express contractual provision of force majeure on contracts.

[435] Atiyah, P. S. *An Introduction to the Law of Contract*. Clarendon Press, 1989. p. 15.

Law were dedicated exclusively to maritime disputes regarding the losses of goods on vessels[436].

The former idea of absolute liability Taylor v. Caldwell establishes the Common Law roots of the impracticability defense. It replaced the Common Law known as efficiency risk bearer analysis of absolute liability towards a Civil Law orientation. Even though the study of Law and Economics brought about Coase, Calabresi, and Posner's converts liability risk analysis into the allocation of losses[437], jurisprudential and scholarly Common Law preoccupation precedes the Law and Economics orientation. The line dividing rights and remedies is subtle, as it divides absolute contractual nature and admissible defenses. That is why all the signs point towards the fundamental divide between rights and exceptions. In Roman categories, the *exceptio* fundamentally guides the outcome of successful defenses and their interplay with equity.

That ambiance did not favor raising exceptions for nonperformance.

Professor Epstein defined the unconscionability doctrine as an "assault upon private agreements,"[438] and for those claims, it is necessary to question the situations in which

The deconstruction of contract law leaves a remainder debtor's body as much as deconstructing the Law edifice will expose violence as the ultimate resource in this field.

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[436] Puller v. Stainforth, 1809, apud Catharine MacMillan, Taylor v. Caldwell, Landmark cases

[437] Swadling, William. “The judicial construction of force majeure clauses.” *Force Majeure and Frustration of Contract*. Lloyd’s of London Press, 1991. p. 4: “It is the ability to allocate risks which provides a major function of the law of contract: it enables individuals and corporations to plan for the future with a moderate degree of certainty and hence to maximise their freedom of action.”

[438] Epstein, Richard A. “Unconscionability: A critical reappraisal.” *The Journal of Law and Economics*, vol. 18, no. 2, 1975, pp. 293-315.

II. Unraveling Exceptions: The Multiplicity of Oaths in Law

II.I. Quantum Comparative Law: traveling in the space-time tissue of Law

Interdisciplinarity in Law constitutes an act of defiance against positivistic and exegetic traditions. French intellectuals, Italian philosophers, and the American critical legal school's deconstruction of the humanities also affected the production of legal scholarship. Comparative Law was not exempted from following this trend, questioning the prevalence of some legal cultures over others and the canons of what constitutes a legal tradition worth transplanting. For the first time, some voices from the South were heard through the work of comparatists revisiting premises that were no longer canon of the discipline. Some ideas required excavating ancient legal history and the roots of the cherished Roman traditions of the Western world. Some scholars proposed instead of a system of temporal linearity in which a tradition succumbs to a more refined one, an alternative in which exchanges constantly took place, retaining what was valuable and dismissing what was rotten.

Foucault uses genealogy to question the arbitrariness of taxonomies and accepted meanings, suspending the naturality by which words enter unconsciousness. This reasoning allowed the previous order to be jeopardized. As a result of the novel tradition of incorporating language in an unprecedented way into the legal discourse, legal systems began to be studied with a twist. Legal scholars deployed Roman Law to support the authority of legal language incorporated into the emerging legal system and, by performing the act of incorporation, transmitted the attributes of everyday language into legal discourse. Among the questions he raised, Foucault remarked how the end of the sixteenth century coincides with the vocation of searching for similarities. Paolo Rossi offers a hint about his constant visits over memory and

how the artificial technique reinforces learning and organizing all things rationally[439]. Rationality was understood as a reproducible method when writing was still minimal. Nietzsche also draws in memory the origins of transactional sacrifices with the final goal of imprinting a remembrance in the other. Part of the task of searching for similarities, other than enforcing memory, is to align with the natural vocation of the brain to see patterns more than chaos in all things. As a precursor of Comparative Law, Montesquieu was also constantly searching for those similarities and dissimilarities[440]. Therefore, the act of comparison requires the constant questioning of established orders.

Legal systems are more intricate than the portrait engraved in codification projects; it required to sediment novelties to assimilate what was once foreign, incorporating it as local in a patchwork that obliterates the already lost past. Comparative Law is a discipline for uncovering the parallels and disparities between different jurisdictions, and there is no exit to avoid questioning how legal systems were crafted and the underlying reasons for their emergency. Assuming the task of uncovering the origins of the Napoleon French Code, a scholar must search not only for the drafter's discussions on Portalis and the theories of Domat and Pothier but also for earlier costumes enacted in the ordinances and for the customs that pervaded the earlier forms of regulating society. Yet, traditional methods of comparative analysis may fall short when confronted with the dynamic and interconnected nature of contemporary legal systems. If one shifts to the traditions that emerged following overseas colonization to grasp a relatable parallel among those traditions, the explanations become even

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[439] Rossi, Paolo. Title of the Work. Riccardo Ricciardi, 1960, p. 239.

[440] Shklar, Judith N. Legalism: Law, Morals, and Political Trials. Oxford University Press, USA, 1987, p. 29.

more obscure as those traditions intermingled with local juridical traditions that remain largely unknown.

The cultural divide that makes societies unique and the disparities affecting legal institutions yawning require the layering of comparative and historical methods of unearthing perceptions to expose the discontinuities, ruptures, and transformations that Law endured. This methodology draws inspiration from Foucault's genealogical approach. His reflections are infused with exploring the sixteenth-century Western culture's epistemology, stressing the role resemblance played in shaping intellectual pursuits. He meticulously dissects a complex intermingled semantic network of notions that informed and organized knowledge during this period. Even the semantics and etymology of juridical concepts deserve a weight long removed from juridical discourse:

> *"The semantic web of resemblance in the sixteenth century is extremely rich:* Amicitia, Aequalitas (contractus, consensus, matrimonium, societas, pax, et similia*),* Consonantia, Concertus, Continuum, Paritas, Proportio, Similitudo, Conjunctio, Copula*. And there are a great many other notions that intersect, overlap, reinforce, or limit one another on the surface of thought. It is enough for the moment to indicate the principal figures that determine the knowledge of resemblance with their articulations. There are four of these that are, beyond doubt, essential."*[441]

Foucault's work is carried out by his genealogy, entailing a thorough examination of the historical progression of legal concepts, customs, and institutions. The epistemes that Foucault visits, as delineated in "The Order of Things," begins with divine interpretations and transitions to a classification-oriented epoch[442]. These shifts, experienced as abrupt disruptions, lay bare the evolving power structures supporting knowledge systems. In the advent of modern sciences, the sanctity of knowledge is challenged and reshaped into a study of processes and

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[441] Foucault, Michel. *The Order of Things* [1966, Les mots et les choses]. Routledge, 2002. p. 20.

[442] Foucault, Michel. *The Order of Things* [1966, Les mots et les choses]. Routledge, 2002. Foreword to the English edition, xi: "What I saw was the appearance of figures peculiar to the Classical age: a 'taxonomy' or 'natural history' that was relatively unaffected by the knowledge that then existed in animal or plant physiology; an 'analysis of wealth' that took little account of the assumptions of the 'political arithmetic' that was contemporary with it; and a 'general grammar' that was quite alien to the historical analyses and works of exegesis then being carried out."

functions. This transformation is mirrored in Foucault's analysis of Velázquez's "Las Meninas," where the immortalized sovereigns, despite their spectral presence, command the spectacle, symbolizing the consolidation of divine attributes and knowledge. The deference given to the sovereigns, mirrors society's deference to established knowledge systems, a nod to the complex bond between power and knowledge.

As Foucault remarks, "*Our first glance at the painting told us... it is the two sovereigns... they are the palest, the most unreal... a movement, a little light, would be sufficient to eclipse them*"[443]. In doing so unveils the interconnectedness between power, knowledge, and discourse that contributes to their development and transformation. Rather than adhering to a linear, teleological view of history, this approach emphasizes the importance of examining the breaks, shifts, and adaptations over time to understand better the complex dynamics that shape legal ideas and practices.

On the other hand, Derrida's concept of deconstruction offers a powerful lens through which to examine the intricacies of Law, including Comparative and Private Law, by challenging the binary oppositions and hierarchical structures that underpin legal discourse and institutions [444]. By applying deconstruction to the study of Law, scholars can reveal the inherent instability and indeterminacy of legal concepts and institutions, exposing the subtle interplay of power, language, and interpretation that shapes legal practices and outcomes.

One passage in which Legrand reinterprets Kötz cluster ideas deserves special attention. In "Paradoxical Derrida," Legrand urges the need for the comparatist to "transcendentalize

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[443] *The Order of Things*, Routledge, 2002, p. 15

[444] Legrand, Pierre. "Paradoxically, Derrida: for comparative legal studies." *Cardozo L. Rev.*, vol. 27, 2005, p. 631. Derrida, Jacques. *Of Grammatology*. Johns Hopkins University Press, 1976. p. 101. See also Legrand, Pierre. "Jameses at play: a tractation on the comparison of laws." *The American Journal of Comparative Law*, vol. 65, suppl. 1, 2017, pp. 1-132. For an illuminating reply to Legrand's criticism, Gordley, James. "Comparison, law, and culture: a response to Pierre Legrand." *The American Journal of Comparative Law*, vol. 65, suppl. 1, 2017, pp. 133-180. Siliquini-Cinelli, Luca. "Experience vs. knowledge in comparative law: critical notes on Pierre Legrand's 'sensitive epistemology'." *International Journal of Law in Context*, vol. 16, no. 4, 2020, pp. 443-458.

themselves." As he further develops, that process is elementary, a process of deconstruction and difference[445].

In the context of Comparative Law, deconstruction allows for a more critical engagement with the diverse legal traditions and systems that constitute the global legal landscape. By interrogating the foundational concepts and principles that underlie different legal systems, deconstruction exposes the contingent and constructed nature of these systems, challenging the notion of a fixed, universal legal order[446]. This approach encourages a more nuanced understanding of the complex interplay of cultural, historical, and political factors that have shaped the development of legal institutions across different societies, fostering a more dynamic and reflexive approach to comparative legal analysis[447].

Deconstruction also reveals the unstable and contingent nature of legal categories and relationships, such as contracts[448], property, and torts. By examining the binary oppositions

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[445] Legrand, Pierre. "Paradoxically, Derrida: for comparative legal studies." *Cardozo L. Rev.*, vol. 27, 2005, p. 631.

[446] Derrida, Jacques. "Force of law: The "mystical foundation of authority"." *Deconstruction and the Possibility of Justice*, edited by Drucilla Cornell, Michel Rosenfield and David Gray Carlson. Routledge, 1992, pp. 3-67. p. 15: "Deconstruction is justice. It is perhaps because law (droit) (which I will consistently try to distinguish from justice) is constructible, in a sense that goes beyond the opposition between convention and nature, it is perhaps insofar as it goes beyond this opposition that it is constructible and so deconstructible and, what's more, that it makes deconstruction possible, or at least the practice of a deconstruction that, fundamentally, always proceeds to questions of droit and to the subject of droit. The deconstructability of law (droit), of legality, legitimacy or legitimation (for example) makes deconstruction possible."

[447] See Robilant, Anna Di. "Genealogies of soft Law." *The American Journal of Comparative Law*, vol. 54, no. 3, 2006, pp. 499-554, pp. 501-503. Eller, Klaas Hendrik. "Comparative genealogies of "contract and society"." *German Law Journal*, vol. 21, no. 7, 2020, pp. 1393-1410. Monateri, Pier Giuseppe. "Everybody's Talking: The Future of Comparative Law." *Hastings Int'l & Comp. L. Rev.*, vol. 21, 1997, p. 825. Kennedy, Duncan. "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought." *The American Journal of Comparative Law*, vol. 58, no. 4, 2010, pp. 811-841. Gordley, James. "Is comparative law a distinct discipline." *Am. J. Comp. L.*, vol. 46, 1998, p. 607.

[448] Derrida, Jacques. "Force of law: The "mystical foundation of authority"." *Deconstruction and the Possibility of Justice*, edited by Drucilla Cornell, Michel Rosenfield and David Gray Carlson. Routledge, 1992, pp. 3-67. p. 5-6: "The first is 'to enforce the law,' or 'enforceability of the law or contract.' When one translates 'to enforce the law' into French, by 'appliquer la loi,' for example, one loses this direct or literal allusion to the force that comes from within to remind us that law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable. Applicability, 'enforceability,' is not an exterior or secondary possibility that may or- may not be added as a supplement to law. It is the force essentially implied in the very concept of justice as law (droit), of justice as it becomes droit, of the law as 'droit' (for I want to insist right away on reserving the possibility of a justice, indeed of a law that not only exceeds or contradicts 'law' (droit) but also, perhaps, has no relation to law, or maintains such a strange relation to it that it may just as well command the 'droit' that excludes it). The word 'enforceability; reminds us that there is no such thing as law (droit) that doesn't imply in itself, a

and hierarchical structures that underpin these legal concepts, deconstruction highlights the tensions and contradictions inherent within private Law, challenging the notion of a coherent, unified legal order[449]. This approach enables a more critical engagement with the power dynamics and interpretive practices that govern the formation and enforcement of private legal relationships, shedding light on how legal institutions both reflect and reproduce broader social and cultural values[450]

By revealing the inherent instability and indeterminacy of legal concepts and practices, deconstruction fosters a more critical and reflexive approach to legal analysis, contributing to a richer, more nuanced understanding of the complex dynamics at play in the construction and evolution of legal relationships and institutions.

When examining legal institutions, familiar terms such as contracts, property, land ownership, and possession might be encountered. For instance, observing contractual dealing in Roman societies will significantly differ from the same operation in the American colonies[451], given the temporal and cultural divide divergence[452]. Meanwhile, another

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priori, in the analytic structure of its concept, the possibility of being 'enforced,' applied by force." Before deconstructing, it is worth also providing the bedrocks by which legal scholarship edify their ideas.

449 Kennedy, Duncan. *The Rise and Fall of Classical Legal Thought*. Cambridge, 1998. p. 214.

450 Gordley, James. "Is comparative Law a distinct discipline." *Am. J. Comp. L.*, vol. 46, 1998, p. 607, pp. 609-610, p. 615: "We cannot compare things that are utterly different. We can say that things differ in a certain respect only if they have something else in common that makes comparison possible. Orange light has shorter waves than indigo, and sea water is saltier than Perrier. But what would it mean to compare the color orange with the taste of sea water? A biologist compares us with other vertebrates and learns about the different ways of being a vertebrate. He does not compare vertebrates with sun-spots or the Dow Jones Industrial Average or the poems of Gerard Manley Hopkins." See also Fletcher, George P. "Comparative law as a subversive discipline." *Am. J. Comp. L.*, vol. 46, 1998, p. 683.

451 Watson, Alan. *Legal Transplant: an approach to Comparative Law*. University of Georgia Press, 1993. p. 66: "*After various vicissitudes a code of law was issued in 1648 under the titleThe General Latins and Liberties Concerning the Inhabitants of the Massachusetts This, the earliest code of the modem Western legal world, deserves to be much better known. It was drafted by three' county committees with a total of 18 members. Of these at least John Winthrop, Richard Bellingham and Nathaniel Ward had legal training, and Ward, John Cotton, John Norton and Thomas Shepard, were the colony's most prominent ministers. The Bible was one source of inspiration.*" As Watson develops his ideas on legal transplants, the transplant from England followed a process of adaptation for the new realities faced by the settlers, specially regarding property law and the unfolding consequences of chartering the unknown territory.

452 Magdelain, Andre*. Le Consensualism dans L'édit du préteur*. Recuil Sirey, 1958. p. 76-77: "On a coutume de considérer comme parfaitement naturelle l'interprétation restrictive de l'édit de *pactis*, telle qu'elle se manifeste aux II et III siècles après Jèsus-Christ. Ses anomalies n'ont pas été suffisamment soulignées. Jusqu'à présent, nous n'en avons relevé qu'une. Nous avons insisté, au point de vue de la philologie juridique, sur la contradiction inhérente au texte de l'édit. Alors qu'il parle des pacta conventa en général, il ne trouve pas

divergence pattern is how contemporary societies enter agreements, depending on their juridical tradition and observance of the laws. The advantage of acknowledging the cultural divide enables the observer of a given legal system to appreciate both. In any event, if all the effort is constituted on finding the divergences and never the convergences, there is no point in deploying scientific methods to categorize and study an institution. When scientists assigned a taxonomic rank for forms of life, they did so to facilitate the study of a plural life experience. Even deploying the most rigid scientific methods at some point, this operation is arbitrary as much as a jurist divides rights into personal and property rights. The controversy of justifying the relationship between a person and a thing is a persistent challenge to this day.

The theories of comparative Law deferential to diversity will apply methods that praise cultural differences as positive. In contrast, functional approaches blend and harmonize legal systems, equalizing some nodal points that prevent institutions from traversing jurisdictional plurality. The downside of comprehensive projects of amalgamating variety is the tendency to privilege some to the detriment of others for the most varied reasons: exercising control, enforcing privileges, or simply suppressing dissenting voices. Intrinsically, there should be no moral evaluations but an exercise of epistemological choice.

And even though scholars have long debated the most effective method for evaluating the transference of contractual dealings over time, the question is far from being settled. Some argue that the functional approach, which focuses on identifying the underlying social or economic functions of legal rules and institutions, is most appropriate for this task[453]. Others contend that the historical approach, which emphasizes the evolution of legal systems and the influence of legal traditions, provides a more accurate perspective on developing contractual

d'autre application que l'exception *pacti conventi*. Ce problème n'est pas un faux problème. Ulpien l'avait posé et résolu selon la mode de son temps. Il lui a consacré un long développement dont nous croyons avoir retrouvé l'esprit. A cette anomalie, si clairement ressentie par Ulpien, s'en ajoute une autre qui a traire à la structure de l'Album. »

[453] Zweigertz and Kötz. *An Introduction to Comparative Law*, 1998, p. 34-35.

dealings[454]. The structural approach, which seeks to reveal the underlying legal structures and principles that shape different legal systems, has also been praised for its potential to illuminate the transformation of contractual dealings across time and space[455].

Either the side that defends a mixed-methods or for offering a vote of total defiance against a blending of those approaches resumes without contesting the claim of narrowmindedness and *naivité* inherent to the inescapable choice. Instead, an approach allowing for the transcendental comparatist to emerge allows for a more nuanced understanding of the factors driving the transmission of Private Law institutions. The transcendental mentality also fosters a more holistic appreciation of the complex interrelationships between legal systems. Nevertheless, transcendental comparatists would need to subvert the universal laws of referentiality or immerse themselves into the disruptive laws of an ungoverned classical reality.

Traveling in the space-time tissue of Law implies applying some quantum physics principles as an approach that seeks to transcend the boundaries of conventional comparative Law by exploring legal institutions and systems through the lens of quantum mechanics. The application of quantum principles offers a novel perspective on the complexity of legal concepts, doctrines, and institutions as they evolve across different temporal and spatial dimensions. By activating laws subverting classical physics, quantum comparatists express their understanding by transitioning orbits of legal knowledge, merging their horizon to the multiple probabilities that entangled the legal universe.

The uncertainty principle[456], which acknowledges the dual particle-wave nature of everything in the universe, presents an intriguing parallel in Law. Analogous to the

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[454] Watson, Alan. *Legal Transplants: An Approach to Comparative Law*, 1974, p. 20-21.
[455] Gordley, James. *Foundations of Private Law*, 2006, p. 15-16.
[456] Uncertainty is appealing as a principle that could be transposed to Law because it acknowledges the dual particle-wave nature of everything in the universe. The analogies that can be drawn regard the impossibility of extracting measures that both provide the position and speed of an object. It is a calculus that involves approximation by collapsing multiple waves-lengths of an object into a limited space, and even if that process

impossibility of simultaneously determining an object's position and speed with absolute certainty, observing a legal institution cannot yield a comprehensive understanding of its static nature and underlying dynamics. This challenge is inherent in legal comparison, as it is difficult to simultaneously analyze both aspects of a legal institution without being immersed in its context.

Quantum Comparative Law endeavors to delve into the deeper layers of legal systems, uncovering the nuances and subtleties that may elude traditional comparative methods. By embracing the uncertainties and probabilistic nature of legal systems, this approach acknowledges the inherent limitations of human understanding and the need for continuous adaptation and evolution. By examining legal institutions through a quantum lens, the omnipresent aspiration is to establish a more comprehensive comparative law framework, enriching the discourse and fostering innovative solutions to contemporary legal challenges.

The following sections will explore the theoretical underpinnings of Comparative Law in general and demonstrate its practical applications in analyzing legal institutions, doctrines, and systems. Through various case studies and examples, the potential of this novel approach will be illustrated to unlock new dimensions of understanding and contribute to the ongoing development of comparative Law as a discipline.

Legal concepts traveled unparalleled distances, permeated the legal thoughts of entire civilizations, and adapted to the changing world. Like the social contract discussed by Hobbes and Rousseau[457], imagining a world without currency and means of exchange mediated by a higher authority proves challenging. Concepts that might be considered inherent to society have, in fact, originated from thinkers who anticipated the current world.

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were to be repeated multiple times, it would never achieve the certainty of knowing both the position and speed simultaneously. The exact parallel of particles can be applied to the Law. The observation of an institution cannot be done to obtain an accurate static picture of a motionless reality. It will lack the dynamics that led the institution to achieve the meaning it has while stationary. That is the difficult task assigned to legal comparison, the impossibility of extracting both realities without being within.

[457] Rosseau, Jean-Jacques. *The Social Contract*. Penguin Books, 1968. p. 14.

Contracts, for example, can be analyzed in a broader context. The sanctity of contracts is often judged based on the assumption that powerful individuals impose terms on the other party. However, it is often overlooked that contracts empower parties to bind their destinies according to their wills[458]. Without contractual dealings, individuals would be subject to the state's will or the decisions of third parties regarding how they should conduct their affairs.

In order to consider legal categories without prejudices, one can draw an analogy to language[459]. Legal institutions evolve out of necessity, just as language changes and mixes with different cultures over distances. It develops new definitions and names based on the necessities of its speakers. And here the language analogy presents itself as more accurate than the scientific one, changes on language are like deposit of materials, with time it presents a very different configuration, without the need for master explanations required while approaching natural phenomena (as opposed to cultural).

To legislate is a luxury for people who can allow themselves to support a handful of skillful speakers to support different points of view and draft laws that may or may not serve their interests in the future[460]. Societies evolve by developing mechanisms to resolve disputes more cost-effectively than engaging in conflict and the wasteful expenditure of resources, as exemplified by Bataille's concept of potlatch in primitive societies[461]. Legal systems that adapt to market-oriented inclinations are more likely to be replicated, considering that their economic outcomes measure their success.

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458 Gordley, James. *Foundations of Private Law*. Oxford University Press, 2006. p. 25.

459 Derrida, Jacques. *Writing and Difference*. University of Chicago Press, 1978. p. 281.

460 Chroust, Anton-Hermann. "Legal Profession in Ancient Republican Rome." *Notre Dame Law.*, vol. 30, 1954, p. 97.

461 Which in reality is not much less rational than the transfer of wealth though contractual bargains. See Bataille, Georges. *The Accursed Share*. Zone Books, 1988. p. 67-68: "Potlatch is, like commerce, a means of circulating wealth, but it excludes bargaining. More often than not it is the solemn giving of considerable riches, offered by a chief to his rival for the purpose of humiliating, challenging and obligating him. The recipient has to erase the humiliation and take up the challenge; he must satisfy the obligation that was contracted by accepting. He can only reply, a short time later, by means of a new potlatch, more generous than the first: He must pay back with interest."

The legal profession divides the task of exploring models in other contexts among comparatists, legal historians, and internationalists. Each navigates various legal cultures separated geographically or temporally. However, with the constant interaction and irritation among fields, it becomes more critical every day to blend those fields into one, that is, as many scholars pointed out, genealogical[462]. Disseminated legal ideas assume a ductile expression that cannot be precisely traced. Here is where the role of a quantic comparatist gains relevance.

In the realm of comparative Law, the emergence of a "quantic comparatist" may draw inspiration from Heisenberg's uncertainty principle in quantum physics[463]. The quantic comparatist would adopt a multifaceted approach to legal analysis, evaluating legal systems in a dynamic rather than static manner. This approach would involve observing legal systems in their complex and ever-changing reality while acknowledging such an analysis's inherent limitations and challenges.

The role of specialized fields, such as comparative Law, legal history, and international Law, involves traversing the space-time continuum of legal systems to collect fragments of past societal rules and safely transport them to the present. Like delicate experiments dealing with artifacts found in uncanny circumstances, these legal fragments must be prepared for exposure to the present, resembling fossils or vestiges of vanished world order.

Maitland provided one of the most accurate descriptions of the aims of legal history situated through comparative law, eloquently captured in the assertion: "*an isolated system cannot explain itself, still less explain its history*"[464]. This assertion illuminates the integral

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[462] MacIntyre, Alasdair. *After Virtue*. University of Notre Dame Press, 1981. p. 222.

[463] Heisenberg, Werner. *Physics and Philosophy: The Revolution in Modern Science*. Harper & Row, 1958. p. 53: "The probability function combines objective and subjective elements. It contains statements about possibilities or better tendencies ("potentia" in Aristotelian philosophy), and these statements are completely objective, they do not depend on any observer; and it contains statements about our knowledge of the system, which of course are subjective in so far as they may be different for different observers. In ideal cases the subjective element in the probability function may be practically negligible as com- pared with the objective one. The physicists then speak of a 'pure case'."

[464] Maitland, Frederic William. "Why the History of English Law is not written." *The Collected papers of Frederic William*, edited by H. A. L. Fisher, vol. I. Cambridge University Press, 1911, pp. 480-497. p. 489: "an isolated system cannot explain itself, still less explain its history. When great work has been done some

role legal history plays in comparative law, exposing the unfeasibility of perceiving the evolution of legal systems in isolation, devoid of their historical contexts. Comparative law is not merely an exercise in contrasting legal provisions across jurisdictions but rather a profound exploration of the symbiotic interplay of legal systems across time and space. As identified by Maitland, the influences of Azo, Lombard feudists, Savigny[465], and Brunner accentuate this complex intertwining. Thus, comparative law can only be fully appreciated when intersected with legal history to situate the very particular domestic scenario that the legal community just left as enriching transnational influence. To situate the present as the ruling of the exception it is assumed that part of the analysis retrocedes to previous scenarios in which the very reality now in the brink of collapse was once thriving. For that task comparative Law alone does not suffice its ends since the malaise pervades contemporary legal cultures in a similar manner. Rather, one needs to find analogy in past times through the use of legal history

As scientists study fossils to understand past societies, their knowledge is inherently limited. For instance, while ample evidence supports the notion that dinosaurs were enormous, it is challenging to assert with certainty that these creatures had feathers or to describe all their behaviors. Similarly, legal institutions require interpretation, imagination, and continuous improvement. Despite the existence of Justinian's code, which compiles Roman provisions over centuries, the fragments passed down through generations undergo dramatic changes and adopt new dimensions. Gaius's Institutes, for example, include instructions on addressing force *majeure event*s[466], and the ancient principle of *res perit domino* continues to pervade

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fertilizing germ has been wafted from abroad; now it may be the influence of Azo and now of the Lombard feudists, now of Savigny and now of Brunner. Let me not be misunderstood: — there is not much 'comparative jurisprudence' for those who do not know thoroughly well the things to be compared, not much 'comparative jurisprudence' for Englishmen who will not slave at their law reports ; but still there is nothing that sets a man thinking and writing to such good effect about a system of law and its history as an acquaintance however slight with other systems and their history."

[465] Kantorowicz, Hermann. “Savigny and the historical school of law.” *LQ Rev.*, vol. 53, 1937, p. 326.

[466] Johnston, David. *Roman Law in Context*. Cambridge University Press, 1999. p. 65: “To cut a long story short: freedom of contract allowed the parties to make their own bargain. They might opt to share the risk of crop failure, as in Gaius’s example, or they might contract to place the whole risk on the tenant (Ulpian, D. 19.2.9.2). But, if they made no other agreement, the risk of *force majeure* was on the landlord. The very existence of this

legal teachings, which does not imply that the reception of those principles occurred in a linear and predictable pattern.

In advancing these arguments, the aim was to illustrate legal systems' inherent complexities and dynamism, calling for a shift towards a 'quantum comparatist' detachment for accepting the unfeasibility of objective comparison.

This perspective considers the uncertainties and the interplay of factors shaping legal systems across time and space, akin to navigating through a wonderland of legalities. A more comprehensive, nuanced understanding of legal concepts, doctrines, and institutions can be achieved by interweaving quantum physics and deconstruction theory into the tapestry of comparative law.

The solution for the binary paradox divergence-convergence is found by dividing epistemological optimism and pessimism, as Mark Van Hoecke advances:

> "*Maybe they both have a biased view of reality. Strong epistemological pessimism has a perfectionist view on 'understanding'. If you do not fully understand something, you do not understand anything. In practice this means that almost nobody can understand almost anything ...They are closed to the external world. Each culture or 'system' has its own 'code', and converts all external information into its own language. There is no common language. Real communication, in this view, is impossible. This conclusion, however, is clearly refuted by our common sense observation of reality and the knowledge offered by world histor*y."[467]

Perhaps none of the efforts are epistemologically appropriated for deciphering this 'Law in Wonderland, and all that is left for continuing the journey of founding common grounds of human rationality concerned to Law, as it will always be *'forbidding and difficult'*. Scholars grapple with the fluidity of legal institutions across boundaries and their uncanny ability to

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doctrine shows that landlords did not have the law all their own way: in certain circumstances it was appropriate for them and in practice they would probably have had little alternative but to make concessions in order to retain their tentants. That is exactly what Pliny appears to have done (ep. 9.37;10.8)" See also Luzzatto, Giuseppe Ignazio. *Caso Fortuito e Forza Maggiore come limite alla responsabilità contrattuale, I. La responsabilità per custodia*. Giuffrè, 1938-XVI, p. 19-20: "I giureconsulti romani avrebbero avuto del casus un concetto semplicemente negativo, come di contrapposto alla culpa. Sarebbe *casus* ogni evento naturale, o ad esso assimilato, indipendentemente dalla volontà dell'obbligato. […]

[467] Van Hoecke, Mark. "Deep Level Comparative Law in Mark Van Hoecke (ed)." *Epistemology and Methodology of Comparative Law*, 2004, pp. 165-195. p. 173.

replicate functionality across geographically and culturally disparate jurisdictions. This phenomenon is encapsulated in Legrand's metaphor of "displacement"[468], informed by Freud's inner exploration of displacement[469].

But once whatever is displaced, it will be replaced somewhere, imbued with a previous memory of loss, of dislocation. By adopting the body metaphor to the last consequences, a transplant assumes that the heart ingrained in one's body, once transplanted, will perform to serve a different body, even if it resembles enough to have been transplanted in the first place. But once in the novel environment, it will keep a distant relationship to the body it once appertained. Metaphors activate heuristical capacities, allowing the individual to draw unexpected correlations[470].

That footprint of a previous existence, as Vinogradoff assertively reports as the "*second ghostly life of Roman Law*,"[471] assumes a very accurate portrait. The previous organ's host could be longly dead, not sharing an earthly existence with the transplanted place. However, part of the performing functions of the organ will evoke the reality in which it existed before the displacement. Legal transplants, akin to their biological counterparts, leave an indelible imprint of their original environment, a spectral trace of prior existence[472].

Another cornerstone of legal theory that relies on metaphorical constructions is Teubner's approach to the concept of legal irritation towards the treatment of good faith in

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[468] Legrand, Pierre. "What 'Legal Transplants'?" *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest. Hart Publishing, 2001. p. 55.

[469] Freud, Sigmund. *The standard edition of the complete psychological works of Sigmund Freud [1901]*. The Hogarth Press, 1964. p. 259.

[470] Nelken, David. "Towards a Sociology of Legal Adaptation." *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest. Hart Publishing, 2001, pp. 7-54. p. 16: "*Given that there will necessarily be limits to this resemblance it follows that all metaphor will be misleading, at least in some respects. The value of metaphors can lie only in their heuristic possibilities – the way they led us to think in a new and imaginative ways, in the present case, about the processes of legal transfers.*"

[471] Vinogradoff, Paul. *Roman law in mediaeval Europe*. New York, London: Harper & Brothers, 1909. p. 4.

[472] Pringsheim, Fritz. "The Inner Relationship Between English and Roman Law." *The Cambridge Law Journal*, vol. 5, no. 3, 1935, pp. 347-365. Also in Legrand, Pierre. "What "Legal Transplants"?" *Adapting Legal Cultures*, edited by David Nelken and Johannes Feest. Hart Publishing, 2001, pp. 55-70, p. 55: "'Transplants', then, implies displacement. For the lawyer's purpose, the transfer is one that occurs across jurisdictions: there is something in a given jurisdiction that is not native to it and that has been brought there from elsewhere. What, then, is being displaced? It is the 'legal'or the 'law'?

German and England. He defines "loose" when legal production is detached from cultural norm production and tight when social and legal factors are "*tightly coupled*." At first glance, the allusion seems unassuming, but digging more profoundly into the consequences of it, one realizes that coupling legal institutions reveals a striking reality beneath the surface, meaning that at one level, cultural and legal norms are deeply entrenched. On the other hand, thinking about institutions separated through jurisdictions, the loose and tight coupling manifest some serendipitous patterns[473].

Comparative law operates on a plane that transcends geographical boundaries, and institutions alive in a particular historical moment can be replicated in a somewhat different one and still fulfill the same functions.

Although Watson's *'legal transplants'*[474] are not immune to weaknesses, these ideas still captivate a comparative discourse in which institutions can be uprooted from one system and grafted into another. If one objection could be raised against a theory developed by a concrete state mind as opposed to a liquid, it would be one concerned with the fluidity and inconstancy of institutions and of the epistemes that enabled its creation in the first place, particularly concerning the uncanniness of the other[475].

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[473] Teubner, Gunther. "Legal irritants: good faith in British law or how unifying law ends up in new divergencies." *The modern law review*, vol. 61, no. 1, 1998, pp. 11-32.

[474] Watson, *Legal Transplants: An Approach to Comparative Law*, 1993, pp. 22.

[475] Santner, Eric L. *On the psychotheology of everyday life: Reflections on Freud and Rosenzweig*. University of Chicago Press, 2001. pp. 5-6: "*In the Freudian-Rosenzweigian view I will be elaborating here, the biblical traditions inaugurate a form of life structured precisely around an openness to the alterity, the uncanny strangeness, of the Other as the very locus of a universality-in-becoming. Both Schwartz's and Assmann's understanding of cultural pluralism is, we might say, grounded in a global consciousness, whereas both Freud and Rosenzweig emphasize the difference, opened by the 'Mosaic distinction,' between the global and the universal. For global consciousness, conflicts are generated through external differences between cultures and societies whereas universality, as I am using the term here, signifies the possibility of a shared opening to the agitation and turbulence immanent to any construction of identity, the Unheimlichkeit or uncanniness internal to any and every space we call home. In this view, redemption (or, to use the more Freudian term: the cure) signifies not some final overcoming or full integration of this agitation but rather the work of traversing our fantasmatic organizations of it, breaking down our defenses against it. To put it another way, for global consciousness, every stranger is ultimately just like me, ultimately familiar; his or her strangeness is a function of a different vocabulary, a different set of names that can always be translated*".

However, a way to conciliate the instability and exoticism arising from this permanent otherness, to overcome those instances of difference is to conceptualize a state in which, regardless of the bending of the space-time separating institutions, in an undisclosed process, those institutions could still be somehow *coupled,* as Teubner alluded in this "tight and loose coupling" hint.

The possibility of two particles' behavior being identical regardless of the abyssal distance separating them caught Einstein in stupefaction. In that strange order of things, nothing denoted a process of communication or casualty. Any physical event in a common sense could explain how two different particles could be coupled without sustaining a channel of exchange.

The phenomena that came to be described as quantum entanglement was perceived by Einstein as "spooky action at a distance" since those objects were correlated and behaved accordingly regardless of how distant they were.

Quantum entanglement performs as an intertwined state, regardless of the distance separating them, they will exhibit traits that transcend geographical and cultural confines. Thus, the entanglement principle metaphorically paints a picture of legal systems that, despite their differences, remain connected through shared or transferred principles and institutions.

The principle of quantum entanglement provides a valuable analogy. Just as entangled particles remain interconnected regardless of spatial separation, a property Einstein referred to as a "*spooky action at a distance*," legal institutions exhibit a similarly perplexing form of persistent interconnectedness[476]. The critical point to recognize in this comparison is the intricacy of both systems: quantum entanglement and the process of legal transplantation. The complexities are formidable, necessitating care in handling these systems to avoid disruptions

[476] Salart, Daniel, et al. “Testing the speed of 'spooky’ action at a distance.” *Nature*, vol. 454, no. 7206, 2008, pp. 861-864.

that may lead to distorted functionality. In understanding these complexities, a better comprehension of the processes and outcomes of legal transplantation becomes achievable.

Vattimo's "weak thought" perspective[477], understood with Legrand's negative Comparative Law (NCL) keys[478], makes a compelling argument to dislocate the subject endeavoring to "*intrude*" into Comparative Law. Additionally, spinning the optics of who is entitled to speak on behalf of the field, it allows echoes from legal traditions that always had drunk from traditional sources but were never allowed to speak as those traditions were also theirs since the lack of authenticity permanently silenced them, a mimicked copy of the respect-deserving legal traditions[479].

'Il pensiero debole,' is not about intellectual frailty but an acceptance of thought's strictly interpretive character since it recognizes the inability of thought to rely on firm

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[477] Vattimo, Gianni. *Il pensiero debole*, a cura di Gianni Vattimo e Pier Aldo Rovatti; testi di Leonardo Amoroso et al., 2nd ed. Feltrinelli, 1984. p. 42. See also Zawadzki, Andrzej. *Literature and weak thought*, Vol II. PL Academic Research, 2013. p. 15: Weak thought may also be treated as an attempt to describe or diagnose contemporary culture. This would be the third area – alongside the ontological and epistemological – where the concept might be applied. Thus it would describe modern and postmodern experience, especially its characteristic randomness, the disintegration of the permanent structures on which existence has been founded in traditional societies and the supplanting of them by forms of life deprived of any stability or rootedness in unchanging values, the disappearance of the difference between the real and the imagined, the thing and its image, the mediation of cognition and experience of the world through the "I", and the end of "strong" subjectivity. It is precisely this historical and cultural dimension of weakening that Vattimo most clearly accents."

[478] Legrand, Pierre. *Negative Comparative Law: a strong programme for weak thought*. Cambridge University Press, 2022, pp. 386-387: "In addition, NCL's title refers to 'weak thought'. I lift the expression. from Gianni Vattimo's philosophical work. At the outset, it is important to indicate that what Vattimo styles' weak thought' ('il pensiero debole') has nothing to do with a weakness of thinking. Who, indeed, would want to encourage that? Vattimo's key insight concerns the requirement for thought to accept its strictly interpretive character. In other words, thought must recognize that it is incapable of relying on sure epistemic foundations – for example, that it cannot base itself on objectivity, truth, or method – in a way allowing it to reach epistemically unassailable conclusions. Weak thought acknowledges that it cannot achieve fixity of meaning. The best that thought can do – and this is how it is 'weak' – is to interpret a world or worldly entity (such as a foreign law-text or legal culture). Now, no matter how sophisticated an interpretation manages to be – and some interpretations are very rich – no interpretation, whatever the interpretation, can access a world as it is and produce textual evidence about it that would replicate that world as it is and therefore feature incontrovertible evidence of that world as it is. No interpretation can account for a world or worldly entity (such as a foreign law-text or legal culture) as it is. No interpretation can transform itself into a truth-statement. To turn this enunciation around, veridiction does not – and cannot – pertain to interpretation."

[479] Legrand, p. 316: "Why the transformative move by, say, this Brazilian jurist from the possible to the actual even as another Brazilian jurist, who could also proceed comparatively, makes an earnest show of tacit or express resistance? Why him and not her? Why me, us, and not them? Is it about one having encountered, perhaps fortuitously, favourable comparative circumstances within a given society or legal 'community'? can be made for 'weak thought', a term Vattimo coined to refer to the interpretive nature of thought." See also Borges, Guilherme Roman. *Hermenêutica jurídica descolonial: a revisão dos paradigmas interpretativos em direção à descolonialidade*. Universidade de São Paulo, 2022.

epistemic foundations like objectivity, truth, or method to reach irrefutable conclusions. It acknowledges the cultural freight of legal texts and allows for accepting the epistemological reasons for choices oriented by this insuperable and unavoidable bias.

Envisioning the "entanglements" concept as a linchpin in the epistemological discourse allows for embracing the inherent complexities of legal evolution while moving beyond the conventional, causative logic that so often drives scholarly interpretations of Law. This ontological shift marks the departure from a linear, binary causality echoing mechanical realities towards an acceptance of the multidimensional, non-binary nature of legal pathways[480]. The multidimensional aspect reflects the essence of complex thought required to comprehend an increasingly complex legal reality. What is deemed "weak" within this framework does not indicate laxity; instead, it reflects the nascent stages of understanding a paradigm that remains elusive within the conventional constructs of empirical measurability:

> *"Quantum entanglements are generalized quantum superpositions, more than one, no more than one, impossible to count. They are far more ghostly than the colloquial sense of 'entanglement' suggests. Quantum entanglements are not the intertwining of two (or more) states/entities/events, but a calling into question of the very nature of two-ness, and ultimately of oneness as well. Duality, unity, multiplicity, being are undone. 'Between' will never be the same. One is too few, two is too many. No wonder quantum entanglements defy commonsense notions of communication 'between' entities 'separated' by arbitrarily large spaces and times. Quantum entanglements require/inspire a new sense of a-count-ability, a new arithmetic, a new calculus of response-ability."*[481]

Traversing this theoretical landscape comprises risks inherent in direct transplantation, which might lead to undesired, disruptive consequences if not delicately handled[482]. However, an alternative route for approaching these entanglements as dialogic relationships for unraveling the uncanny resemblances between institutions and the strange phenomena arising

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480 Hart, Herbert Lionel Adolphus; Honoré, Tony. *Causation in the Law.* OUP Oxford, 1985. p. 30.

481 Barad, Karen. "Quantum entanglements and hauntological relations of inheritance: Dis/continuities, spacetime enfoldings, and justice-to-come." *Derrida today*, vol. 3, no. 2, 2010, pp. 240-268. p. 251.

482 Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 1998, p. 42.

from their translocation is a feasible attempt to create relations that, although manifesting weak bounds, still serve for completing a piece in the incomplete understanding the Law can offer[483].

II.II. State's Demise of Will Theory or the Correction of Asymmetries

"Freedom Independence from being constrained by another's choice."[484]

Before assessing why the State played a prominent role in adjudicating contracts, converting freedom of contract into public policies or welfare state regulation, some "reading keys" must be used to understand scholars' contempt of the State's interference with private autonomy, alluding to Guido Alpa's expression on his La 'morte' del contratto[485], and why abstract construction of contractual theory eroded over time. That task involves advancing the study of contract law by adopting the methods and perspectives of scholars who utilized abstract concepts to establish a contract law approach independent from the limitations imposed by case law, consent-based theories[486], damages as the breach remedy, and solutions spanning from disregarding prior reasons for entering agreements to managing the discourse with the legal illusions that led to this unparalleled theory-practice disparity.

Ian MacNeil accurately portrays the effort of defining a transaction as independent from its causes when he describes those modes condensed in the idea that:

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[483] Bakhtin, Mikhail Mikhaĭlovich. *The dialogic imagination: Four essays*. University of Texas Press, 1981, p. 60: "The ancient world was apparently not capable of going further than these. These parodic-travestying forms prepared the ground for the novel in one very important, in fact, decisive, respect. They liberated the object from the power of language in which it had become entangled as if in a net; they destroyed the homogenizing power of myth over language; they freed consciousness form the power of the direct word destroyed the thick walls that had imprisoned consciousness within its own discourse, within its own language.

[484] Kant, Immanuel. *The Metaphysics of Morals [1797]*, translated by Mary Gregor. Cambridge University Press, p. 63.

[485] Alpa, Guido. "La 'morte' del contrato. Dal principio dello scambio eguale al dogma della volontà nella evoluzione della disciplina negoziale del 'common law'." *Causa e Consideration: quaderni di diritto Comparato*, a cura di Guido Alpa e Mario Bessone. CEDAM, 1984, p. 247.

[486] Watson, Alan. *The Law of Obligations in the later Roman Republic*. Clarendon Press, 1965. p. 46.

> "*The purity and simplicity of the traditional tenet arises from its presupposition that a contract is a discrete transaction. A transaction is an event sensibly viewable separately from events preceding and following it, indeed from other events accompanying it temporally one engaging only small segments of the total personal beings of the participants."*[487]

To consider the multiple facets by which higher precepts supersede a contract, the theory of contract must undergo a process of undoing numerous layers of abstraction, reaching back to the kernel of contractual theory, the pillars enabling parties to submit their unlimited wills to a set of commands binding the parties.

As Morris Cohen describes in his well-known "*The basis of Contract*", already cited in the previous chapter[488], a "*cult*" of contractualism[489] led to excesses. According to Cohen, this fictitious state of mind was the cause that brought the recognition of ambiguous forms of transactions all to be called contractual, regardless of the presence of a "meeting of minds" or ignoring the capacity of parties to exercise the same level of persuasion over the other entering a contract. If one side enters into an agreement for the enjoyment of an essential service and the other perceives this party as a source of profit, they engage in exchange, but on unequal terms. For that reason, the will theory of contract, although supported by authors of the height of Savigny, Windsheid, Pothier, Planiol, Pollock, Salmond, and Langdell [490], does stand alone in the universe of contracts justification.

Besides the will theory, Cohen places among those reasons for enforcing contractual relations the sanctity of promises (as Kantians and Pound embrace), the injurious-reliance theory, the equivalent *quid pro* quo theory (as Ames mentions in the disagreement over the birth of consideration on *quid pro quo* basis), formalism from the Romanist tradition, and the distribution of risks approach (that would later become the entire branch of Law and Economics

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[487] MacNeil, Ian R. "The many futures of contracts." *S. Cal. l. Rev.*, vol. 47, 1973, p. 691
[488] Cohen, Morris R. "The basis of contract." *Harv. L. Rev.*, vol. 46, 1932, p. 553.
[489] Cohen, p. 568.
[490] Cohen, p. 575.

that swallowed the Law itself). In a very illuminating allusion, Cohen assembles the intricate connection of private sovereignty and the state when he asserts:

> *"The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. It thus grants a limited sovereignty to the former. In ancient times, indeed, this sovereignty was legally absolute. The creditor acquired dominion over the body of the debtor and could dispose of it as he pleased. But even now, when imprisonment for debts has been, for the most part, abolished, the ability to use the forces of the state to collect damages is still a real sovereing power and the one against whom it can be exercised is in that respect literally a subject. From this point of view the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power and the one against whom it can be exercised is in that respect literally a subject."*[491]

He magnificently concludes that the movement to "standardize the forms of contract" is the manifestation of a regime of real liberty of contract[492]. The emblem of this moment is when legal scholars realized that the abstractions that enabled the market economy to function constituted an unsustainable abstraction.

When Lawrence Friedman wrote Contract Law in America, his assertions did not go unnoticed by Gilmore's "The Death of Contract," which quoted a long passage from Friedman's observations over abstractions[493]. One fragment worth mentioning, among others that will be discussed over this chapter, concerns Friedman's awareness of what contracts to use for promoting free markets, in the sense that "*Contract law is abstraction - what is left in the law relating to agreements when all particularities of person and subject-matter are removed*."

Objective law serves as a mechanism to curb the unchecked exertion of power by private parties over others[494]. As the arbitrator of parties' contentions, the State establishes

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[491] Cohen, p. 586.
[492] Cohen, p. 587-588.
[493] Gilmore, p. 14.
[494] In examining the intricate relationship between law and violence, the work of Walter Benjamin offers a critical perspective on the mechanisms that underpin legal institutions. Benjamin's analysis reveals the complex interplay between law and violence, highlighting the subtle ways in which seemingly peaceful legal contracts harbor latent violent potential. As one engages with Benjamin's thought-provoking observations, it becomes crucial to recognize the role of violence in both the formation and enforcement of legal contracts, despite their ostensibly nonviolent nature. See Benjamin, Walter. *Toward the critique of violence: A critical edition*. Stanford University Press, 2021. p. 49: “The question makes it obligatory, above all, to establish that a fully nonviolent resolution of conflicts can never amount to a legal contract. A legal contract, however peacefully the parties enter into it, leads ultimately to possible violence. For the contract confers upon each party the right

legislative frameworks and employs coercive force to ensure the fulfillment of contractual obligations between disputing parties. In increasing situations, the adjudicatory State replaces parties' will, redraws contractual transactions, and prohibits one party from exercising undue influence on another. Understanding will as the cement binding promises together have been questioned for as long time as the theory stands on itself, having Clarence Ashley nominated it as a "fetish," since:

> "*Courts should disregard the expressed intention of the parties only in extreme cases and with great caution, but that it is sometimes beneficial to do seems certain. We must not make a fetish of this favorite theory of mutual assent, but recognize that the courts have regularly modified and controlled such assent and without doubt will continue do to so*."[495].

Sometimes one might perceive the discussion of will theory and its disregard over time as an annoying confrontation with a settled past since policies, legislation, regulation in general, and the role of the courts already promoted obedience regarding the uncontrolled exercise of contractual freedom.

In the course of the three globalizations[496], the persistence of classical legal thought, now reimagined as Law and Economics, remains the elephant in the room, unnerving the guests as a disconcerting factor. The formerly dominant idea that individuals' wills could mold

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to resort to violence in some form or another should one party break the agreement. Not only this: like the outcome, the origin of every contract also points toward violence. It need not be immediately present in the contract as a law-positing violence, but violence is represented in it insofar as the power that guarantees the legal contract is, in turn, of violent origin, if not itself legally established in this very contract by means of violence. If the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay."

[495] Ashley, Clarence. "Should there be Freedom of Contract?" *Columbia Law Review*, 1904.

[496] Kennedy, Duncan. "Three Globalizations of Law and Legal Thought: 1850–2000." *The New Law and Economic Development: A Critical Appraisal*, edited by Trubek, David M., and Alvaro Santos. 2006. pp. 25-26: The first globalization occurred during the second half of the nineteenth century and was over by WWI. What was globalized was a mode of legal consciousness. According to its social critics and according to most (not all) of today's historians, the late nineteenth-century mainstream saw law as "a system," having a strong internal structural coherence based on the three traits of exhaustive elaboration of the distinction between private and public law, "individualism," and commitment to legal interpretive formalism. These traits combined in "the will theory." The will theory was that the private law rules of the "advanced" Western nation states were well understood as a set of rational derivations from the notion that government should protect the rights of legal persons, which meant helping them realize their wills, restrained only as necessary to permit others to do the same."

the future has given way to distorted concepts such as the optimal allocation of losses and the assumption that parties can predict their intentions and rationally manage potential disputes outside state adjudication. On a dogmatic European twist, is the obsessive concern with legal dogmatics, and the standing of "cause" as an idea that can be hammered[497].

The epoch of intense state contractual interference relented to markets once corporations assumed control over promises and the unfolding future designed by those players. Macaulay's "*the death of contract: dodos and unicorns or sleeping rattlesnakes*?"[498] reflecting upon Lawrence Friedman's Contract Law in America, concluded that:

> *"years after Friedman wrote his book, contract law in the hands of business lawyers became a powerful tool for gutting many statutes. During the 1960s and 1970s, Congress and the state legislature passed many statutes attempting to empower employees who might be victims of discrimination; consumers who faced conduct on the borders, if not in the middle, of fraud; and franchises subject to the power of franchisors. The business lawyers' solution? Sneak arbitration clause into something that you could call a contract."*[499]

Kessler, Gilmore, and Kronman's casebook allude to a vanishing system in England and the U.S. in which:

> *"the assumption or predictions on which the contract rests will often prove to be false The private world of the contract does not correspond with the objective universe. What was assumed to be possible was in fact impossible. What had been expected to happen did not happen. What did happen was unexpected. By the time the truth has been revealed, one of the parties, or both of them, may have incurred costs, in preparation for perfomance of the contract or in reliance on its being performed, which will represent a dead loss if it is not performed."*[500]

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[497] Recalling Nietzsche's metaphor of a philosopher with a hammer, a critical thinker who "*senses catastrophic turning points in every corner, waiting there in ambush*" in Nietzsche, Friedrich. *Twilight of the Idols, or, How to Philosophize with a Hammer*. Cambridge University Press, 2005. p. 5. It suggests an approach that relentlessly interrogates and restructures familiar concepts, much as Nietzsche envisaged his philosophy.

[498] Macaulay, Stewart. "The death of contract: dodos and unicorns or sleeping rattlesnakes." *Law, Society, and History: themes in the Legal Sociology and Legal History of Lawrence M. Friedman*, edited by Robert W. Gordon and Morton J. Horwitz. Cambridge University Press, 2011, pp. 193-208.

[499] "The death of contract: dodos and unicorns or sleeping rattlesnakes", p. 199.

[500] *Contracts, cases and materials*, 3rd ed. Little Brown and Company, 1986. p. 861.

To support this claim, the authors assembled cases that demonstrated how the consistency of a rigid system of steadfast promises was not sustainable for parties and courts to endorse.

The evolution of the *jus publicum* concept and the distinction between public and private Law serve as crucial starting points for understanding the demise of will theory in contract law. As the nation-state emerged and legal systems evolved, the role of the State in adjudicating private agreements became increasingly important. The distinction between public and private Law has been extensively discussed by various legal scholars throughout history. One influential source that explains the development of the public-private law distinction is H.L.A. Hart's "*The Concept of Law*"[501]. He provided an example of a woman convicted for telling fortunes in 1944, a crime repealed only in 1951. The case illustrated a point he would make to justify Hobbesian thought by the following token:

> "*One ingenious attempt to do this has been made: Hobbes, echoed here by Bentham and Austin, said that 'the legislator is he, not by whose authority the law was first made, but by whose authority they now continue to be laws'. It is not immediately clear if, we dispense with the notion of a rule in favour of the simpler idea of habit, what the 'authority' as distinct from the "power' of a legislator can be. But the general argument expressed by this quotation is clear. It is that, though as a matter of history the source or origin of a law such as the Witchcraft Act was the legislative operation of a part sovereign, its present status as law in twentieth-century England is due to its recognition does not take the form of an explicit order, as in the case of statutes made by the now living legislators, but of a tacit expression of the sovereign's will*."[502]

Parallel to the sovereign will, Hart poses the private-binding promises, as in

> "*Rules relating to the formation of contract will similarly appear as mere fragments of rules ordering persons, if certain things are the case or have been said or done (if the party is of full age, has covenanted under seal or been promised consideration) to di the things which by the contract are to be done*."[503]

To this reductive vision, Hart attributes a particular distortive character[504], since:

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[501] Hart. *The concept of Law*. Oxford Clarendon Press, 1961. p. 49.
[502] Hart, The concept, p. 62.
[503] Hart, The concept, p. 37.
[504] Hart, The concept, p. 38.

> "*The natural protest is that the uniformity imposed on the rules by this transformation of them conceals the ways in which the rule rules operate, and the manner in which the players use them in guiding purposive activities, nd so obscures their function in the co-operative, though competitive social enterprise which is the game*."[505]

In his original reasoning, it becomes evident that Hart underscores the importance of understanding the relationship between individuals and the State (public Law) and the relationships among private parties (private Law) to comprehend the broader legal landscape since it becomes excessively reductively of uniformizing the treatment of the "bad man." Instead of deploying this obscure vice, the attempt should go in the direction:

> "*for the introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel. Not only was it an important step; but it is one which, as we shall argue in Chapter IV, may fairly be considered as the step from the pre-legal into the legal world*."[506]

Albeit the core of his legal theory of establishing the rules of recognition, imbued with a more abstract character, his recasting of rules serves to clear an unexistent separation since all rules somehow bind all participants with diverse objectives. Legal theory is so deep intertwined with Private Law that one that seriously approach contractual law institutions unavoidable will confront the same doubts intriguing legal theorists.

The same reasoning occurred to Roscoe Pound, who contributed to the discourse on the public-private law distinction in his "An Introduction to the Philosophy of Law" (1922), where, in the very last pages of the book, he analyzed the revolution brought about French codification, and how it disrupted exigences beyond individual will exercise.

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[505] Hart, The concept, p.40.
[506] Hart, The concept, p. 41.

The clash between contractual dirigisme and Paschukani's[507] view that Law is nothing but a metalanguage for business were not disregarded subjects for Pound since, for him, "*they are closed related*"[508]. The desire to be free and to be equal, as Pound exhorts, must "*be kept in balance*." In that regard, recalling the French provision to which "*Agreements legally formed take the place of law for those who have made them*," Pound builds a criticism of state intervention, arguing that:

> *"In other words the free wills of the parties had made law for them. The courts could no more change thus than any other part of the law. Even the legislator was bound to respect it as to the contracts of the past. That idea was put in the Constitution of the United States. But it has been disappearing all over the world. In France it is gone entirely. This was covered up for a time by what Austin would have called spurious interpretation. By assuming that the will of the parties had bit been fully expressed, courts could discover in contracts terms which were not there. French legislation then went further and gave the judges power to suspend or rescind contracts and change their conditions. The parties no longer made law for themselves by free contract. French lawyers tell us that partly there was a moral idea here. Contracts might be improvident or changes in the economic situation might affect the value of the promised perfomance or of given promised equivalent. This is akin to an idea we may see at work in the law of legal liability everywhere. It is a humanitarian idea of lifting or shifting burdens and losses so as to put them upon those better able to bear them. Belief in the obligatory force of contracts and respect for the given word are going, if not in some spots actually gone, in the law of today."*[509]

Regardless of how Pound's work was illuminating in general, this passage of this reasoning expresses his discontentment with the spirit of the realist school since it builds abstract precepts to justify oppressive consequences. There is very little reason to agree with it since the philosophy of *laissez-faire* outlined in his concluding remarks ignores the role assumed by stronger private parties to which the fulfillment of equal bargaining power is

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[507] Pashukanis, Evgeny. *The general theory of law and Marxism* [1978 Eng. Trans. Barbara Einhorn]. Transaction Publishers, 2003. p. 123: “The contrast between feudal and bourgeois property can be explained by their different approach to circulation. Feudal property's chief failing in the eyes of the bourgeois world lies not in its origin (plunder, violence), but in its inertia. in the fact that it cannot form the object of a mutual guarantee by changing hands through alienation and acquisition. Feudal property. or property determined by estate, violates the fundamental principle of bourgeois society: 'the equal opportunity to attain inequality’. Hauriou, one of the most astute bourgeois jurists, quite rightly emphasizes reciprocity as the most effective security for property. which can be brought about with the minimum use of external force. This mutuality, which is ensured by the laws of the market, lends property the quality of an 'eternal' institution. In contrast to this, the purely political security vouchsafed by the coercive machinery of state amounts to nothing more than the protection of specified personal stocks belonging to the owners - an aspect which has no fundamental significance.”’

[508] Pound, Roscoe. *An introduction to the Philosophy of Law*. Yale University Press, 1954.

[509] Pound, p. 162-163.

impossible and, therefore, sustaining that the freedom's exercise is as chimeric as the idea that a serf can defy its seignorial master or that someone burdened with a contract that reduces his capacity of choice to serfdom can choose otherwise. Pound's ideas do not reflect the revolution that the adjudicatory role would implement, such as Holmes in the U.S. Supreme Court and Lord Denning in England.

Although the above-mentioned scholarly works highlighting the importance of the public-private law distinction in understanding legal systems' development and contract law's evolution represented a significant contribution to Private Law theory, they neglected some aspect and connections for the better appreciation of will theory's decline.

Meanwhile, the constant reliance on legal fictions for building branches of Law invested with their internal cohesion surged from the need to contend with earlier generations of legal scholars that were not engaging on broader claims about the Law of contracts. As explained by Horwitz, the consolidation of will theory and objectivism proved incompatible. Consequently, when Holmes "*declared that when courts interpret or construe a contract, they impose some policy on the parties regardless of any supposed intention*" he embraced a paradigm shift for contractual theories that exposed the irreconcilable nature between divergent philosophical assumptions[510].

That direction was also endorsed by Corbin, who, in his Quasi-contractual obligations, supported the more objective perspective that damages are an objective outcome of the Law and not necessarily from parties' will. This reasoning led Horwitz to the accurate assertion in which:

> *"As 'policy, welfare, justice, right and wrong 'were substituted as the foundation of contract law, the orthodox effort of the previous generation to distinguish sharply between contract and tort principles began to disintegrate."*[511]

[510] Horwitz, 1992, p. 38.
[511] Horwitz, p. 50.

In reality, every pillar of Law was shaken by the bare indistinction caused by the replacement of a rigid bourgeoise by large amounts of capital inflow. The distinctive feature of reparation on damages instead of particular perfomance as the backbone of civil litigation in the U.S. promotes an even more intense collapse of disciplines in one main route toward conversion of contract and torts into damages. With the expansion of wealth and capital, the importance of Property Law also loses ground to other forms of wealth since, for almost every proprietary claim, it stands as circulating collateral. What the objective theory did, with courts assuming the role of promoting positive law policies, was to create an environment in which the collapse of contractual relationships occurs under the legislative and case-law umbrella.

As will be demonstrated through the reading of Gierke's "*the Social Role of Private Law*," to write his famous opinion in Lochner, Holmes had read Maitland's translation of Gierke's "*Political Theories of the Middle Ages*," a decisive piece on influencing Holmes realist understanding of the interpretation of the due process clause. This view would ultimately prevail on the juridical landscape with the Supreme Court decision in West Coast Hotel Co v. Parrish[512]. The jurisprudential shift coincided with the great depression and Roosevelt's adoption of policies to mitigate private enterprise collapse burdening the most vulnerable[513].

This development prompted the need to draw a clear line between public Law, which governs the relationship between individuals and the State, and private Law, which deals with disputes among private parties. Understanding this distinction is essential before engaging in an in-depth discussion of the will theory's decline, as it highlights the historical context in which contract law has evolved.

[512] 300, US 379 (1937).
[513] Agamben, Homo Sacer II.I.

Centuries were necessary for different organizations to respect the boundaries of each other, what Maitland refers to as the organization's brackets. In this effort to rewind entrenched concepts stabilized through doctrine, statutes, and leading cases, the task of repositioning the exception[514], the unfulfilled expectations, must be addressed with a kaleidoscopic analysis by anatomizing the will, the State and what their commands intend to revamp when building community in the aftermath of bourgeoise's flourishment. An estate lost its connection to what is attributed to a prince or as a status endowed to a limited circle of nobles. In Maitland's reading of Gierke, xxi:

> *"Few words have had histories more adventurous than that of the word which is the State of public and the estate of our private law, and which admirably illustrates the interdependence that exists between all parts of a healthily growing body of jurisprudence."*[515]

To shed some light on this "*legal art" (p. xxiv)* to keep subjects enclosed in a "bracket"[516], Maitland's preface on Gierke's translated *Deutsches Genossenschaftsrecht* alludes to the "few words have had histories more adventurous than that of the word which is the State of public and the estate of our private law, and which admirably illustrates the interdependence that exists between all parts of a healthily growing body of jurisprudence."

One point worth mentioning concerns the presence of an "*unincorporated body*" when the organization has the will on its formation, but it lacks what Maitland ascribed as "brackets," as the case of trusts in English jurisprudence. That peculiarity has multiple implications demanding direct confront with the *persona ficta* figure entitled to rights attributed to physical

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514 Kierkegaard, Søren. “Fear and trembling/Repetition.” *Kierkegaard’s Writings*, translated by Howard Vincent Hong and Edna Hatlestad Hong. Princeton University Press, 1983. p. 226-127: “On the one side stands the exception, on the other the universal, and the struggle itself is a strange conflict between the rage and impatience of the universal over the disturbance the exception causes and its infatuated partiality for the exception, for after all is said and done, just as heaven rejoices more over a sinner who repents than over ninety-nine righteous, so does the universal rejoice over an exception.”

515 Ewan McGaughey's translation and introduction of Gierke's The Social Role of Private Law concisely explains Maitland and Gierke's mutual affiliation in Cambridge, the reason why he partially translated Gierke's *Genossenschaftsrecht.*

516 Maitland's introduction, p. xxiv, Political Theories of the Middle Ages.

persons to emerge and challenge the importance attributed to the last one. This idea of agglutinating individuals' wills is condensed in Maitland's passage, noting:

> *"An open breach with Innocentian orthodoxy and cosmopolitan enlightenment seemed impossible, and so you maintained that the unicorporate body could, as we should sat be 'constructed'as a mere sum of individuals vound only by co-ownerwhip and agreement."*[517]

The result of repelling each other and deterring clumping through the gravitational formation of entities set the boundaries between the State and private organizations, and propitiated the distinction to become sharper, reaching its pinnacle with the U.S Supreme Court decision recognizing a resemblance between natural persons and fictitious persons that were not yet achieved when Gierke wrote his *Genossenschaftsrecht.* It deals with a nuisance that constantly reemerges while studying Private Law, also noted by Georges Chevrier when he traces the Ancient French jurists' task of making a distinction that, over time, lost its current utility.

While the distinction served some very ambitious aims, as remarked by Chevrier, it allowed the service of the rigid social structure, not allowing inflows of different strata. Therefore, to the princes :

> "*Sans doute l'isolement de la notion de souveraineté, entrevu par Claude de Seyseel et achevé par J. Bodin, permit-il de mieux comprendre 'en quoi consiste l'estat du droit public'. Réussit-il à en faire le noyay autour duquel s'aggrégeraient les diverses parties de cette science, par opposition à la science du droit privé?*"[518].

Private Law became a device for bourgeoise's exercise:

> *"La désagrégation de la hiérarchie sociale qui perdait sa rigidité au profit d'une condition moyenne, incarnée dans la bourgeoisie, dont la force économique s'appuyait sur un genre de vie, une morale de classe et un art de la logique étrangers à la vieille noblesse, appauvrie et dépouillée de son prestigem ne*

[517] Maitland's preface on Gierke's translated *Deutsches Genossenschaftsrecht*, p. xxxiii.
[518] In Chevrier's passage from a footnote of the isolation of the notion of sovereignty accomplished by Bodin, p.40.

conduisant-elle pas à la reconnaissance implicite d'une manière de droit commun assorti de privilèges, mais susceptible de former le centre d'une branche indépendante du jus?" The accomplished outcome of those clashes was the specialization of Public Law as "le gouvernement des hommes"[519].

As an illustration of the pervasive influence of corporate personality on the private autonomy of individuals is worth mentioning jurisprudential developments in American case law since they mark the pinnacle of corporate recognition under a system of Law, to cite a few of the most influential in this field, Lochner v. New York (1905) and Citizens United v. Federal Election Commission (2010)[520].

Those landmark cases, disguised as freedom of contract and free speech exercise, inevitably reassess Gierke's organic view of associations and provides a valuable counterpoint, emphasizing the social and communal aspects of human relationships, which the primacy of corporate interests may obscure. The cases of Lochner and Citizens United exemplify the potential for the juridical personality of corporations to interfere with private autonomy, as they effectively elevate the rights of corporations to the same level as those of individuals[521], thus raising concerns about the balance of power in contract law.

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[519] Chevrier, p. 40.

[520] 558 US 310 (2010). The majority held that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited. A dissenting voice regarding the perils of the decision are found in LESSIG, Lawrence. *Republic, lost: How money corrupts Congress – and a plan to stop it*. Hachette UK, 2015. The partial dissent of Justice Stevens is a valuable source for understanding the implication of granting individual guarantees, such as free speech, to perpetual beings, see p. 1199: "The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. Austin set forth some of the basic differences. Unlike natural persons, corporations have 'limited liability' for their owners and managers, 'perpetual life', separation of ownership and control. 'and favorable treatment of the accumulation and distribution of assets [that] enhance their ability to attract capital and to deploy their resources in ways that maximize the returns on their shareholders investments'. […] and their 'personhood' often serves as a useful legal fiction." In Choper, Jesse H.; Fallon, Richard H. Jr; Kamisar, Yale; Shiffrin, Steven H.; Dorf, Michael C.; Schauer, Frederick. *Constitutional Law: Cases, comments and questions*, 12th ed. West Academic Publishing, 2015.

[521] Weber, Max. "Parliament and Government in Germany under a New Political Order." *Weber: Political Writings*, edited by Peter Lassman and Ronald Speirs. Cambridge University Press, p. 146-147: "The large private firms we have today undergone the same development, and the larger they are the more this has occurred. In statistical terms, the numbers of office workers in private firms are growing faster than manual workers, and it is quite ridiculous for our litterateurs to imagine that there is the slightest difference between the mental work done in the office of a private firm and that performed in an office of the State. Fundamentally they are both exactly the same kind of thing. Looked at from a social-scientific point of view, the modern State is an 'Organisation' (Betrieb) in exactly the same way as a factory; indeed, this is its specific historical characteristic. […] Whether an Organisation is a modern State apparatus engaging in power politics or cultural politics (*Kulturpolitik*) or pursuing military aims, or a private capitalist business, the same, decisive economic basis is common to both, namely the 'Separation' of the worker from the material means of conducting the

To address these concerns, states have sought to correct asymmetries in contract law arising from unequal bargaining power between parties, moving away from the will theory and embracing principles prioritizing social welfare and equitable outcomes. Doctrines such as unconscionability and the duty of good faith, rooted in social contract theory, ensure that contracts serve the interests of both parties, thereby mitigating the potential negative consequences of corporate power[522]. The shift towards legal realism and the responsiveness of the law to the ever-changing needs of society reflects a continued effort to balance the rights of individuals and corporations in contractual relationships[523].

As George Chevrier exposes, the divide was believed to the formed by Roman Law but fostered by the Philosophy of Law: "*Les philosophes du droit auraient-ils une responsabilité plus grande, lorsqu'ils ont montré que le régime du droit public était un régime de subordination, tandis que le droit privé était un régime de coordination*?[524]

Instead, the process was accomplished by slightly changing the meaning of concepts to a point at which territorial extensions became ruled not by an embodied person but by a more abstract emblem such as the crown. That process also encountered the formation of multiple wills as the agglutination to justify this idea through the social contract, in a transfer of novel conceptions from Machiavelli to *Loyseau* to Bodin[525].

What Gilmore deems a "process of doctrinal disintegration" of this abstract edifice of classical theory, if observed with contextual lenses, is not as pervasive and detrimental as the scholarship supporting the death of the contract attributed to the phenomena. The emergence of one party exercising extreme rule-making power through standardized (boilerplate) clauses,

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activity of the Organisation - the means of production in the economy, the means of war in the army, or the means of research in a university institution or laboratory, and the financial means in all of them."

522 Farnsworth, E. Allan. "Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code." *30 U. Chi. L. Rev.*, vol. 666, 1963.

523 Horwitz, Morton J. *The Transformation of American Law, 1780-1860*. Harvard University Press, 1977.

524 La distinction du Droit Privé et du Droit Public et l'entreprise publique, p. 3.

525 Dowdall, Harold Chaloner. "Word State." *LQ Rev.*, vol. 39, 1923, p. 98.

now granular and algorithmic precepts, eventually leads to the conclusion that the State should interfere to ensure all intentions are respected, and not just the ones from the strongest, being that the very same reason why state sovereignty emerged in the first place. If one party could impose the rules of private arrangements and the other party was obliged to comply, society would never have left the manorial and feudal statutes.

The birth of modern constitutional Law depended on allowing individuals to participate in enterprises without the control of the manorial lord or a superior authority controlling all the passages of those agreements. Even the guilds, bodegas, and organizations that exercised the monopoly of activities adapted to offer individuals autonomy, unleashing them from former constraints. The emerging nation-state intentionally occupied this void, ready to enact legislation granting those individuals certain freedoms. It might sound contradictory to tie the formation of the state with contractual concerns, but the system would not have gotten so intermingled if the state did not assume tasks of regulating private enterprise as an inevitable duty to ensure all members of society are exercising fundamental freedoms.

At the end of the process of suppressing organisms that could attempt against the state, the outcome was the clear division that occurred between the Public and the private, brilliantly condensed in Gierke's passage:

> *"The Doctrine of the Syaye was reared upon a classical ground-work had nothing to say of groups that mediated between the State and the individual. This being so, the domain of Natural Law was closed to the Corporationm and its very existence was based upon the ground of a Positive Law which the State had made and might at any time alter. And then as the sphere of the State's Might on the one hand, and the sphere of the Individual's Liberty on the other, became the exclusive and all-sufficing starting-points for a Philosophy of Law, the end was that the corporation could find a place in Public Law only as a part of the State and a place in Private Law only as an artificial Individual, while all in actual life that might seem to conflict with this doctrine was regarded as the outcome of privileges which the State has bestowed and in the interest of the public might at any time revoke."*[526]

[526] Gierke, *Political Theories of the Middle Age*, p. 99-100.

In this scenario, laissez-faire pursuits assumed modern contours, indicating that private agreements enabled parties to command their affairs.

One point that Gilmore rightly ascertained was the diminishing prominence of will theory, which had traditionally placed great emphasis on the intentions and consent of contracting parties. Gilmore argues that the emergence of new doctrines and remedies in contract law and the increasing complexity of contractual disputes necessitated a broader approach that considered factors beyond mere consent. This shift in focus reflects the changing legal landscape, as well as the influence of the nation-state on private relations.

In response to these developments, scholars and jurists have debated the merits of the will theory, with some defending its continued relevance, while others, such as Lord Denning[527], advocated for a more comprehensive approach that would take into account the broader societal context and the complexities of modern contractual relationships. By examining the historical development of the *jus publicum* it surfaces as a byproduct the public-private law distinction, and the nation-state's emergence among the factors that contributed to the decline of the will theory in contract law.

The genealogical line of the differentiation between public and private Law finds its roots in Ulpian's "*publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem*" (Dig. 1.1.1.2). This ancient understanding laid the groundwork for the modern conceptualization of the State's role in adjudicating private relationships, including contractual disputes.

As legal thought evolved, sovereignty emerged, playing a significant role in the medieval understanding of the State's function. Jean Bodin's lesser-known "Methodus ad

[527] Atiyah, P. S. “Lord Denning's Contribution to Contract Law.” *Denning LJ*, vol. 14, 1999, p. 1. Atiyah echoes the belief that Lord Denning's perspectives were aligned with the common person's understanding—his considerations were grounded in a profound sensitivity towards human adversities. See also for a further investigation on the theory of promissory estoppel, also in America in Gordley, James. “Enforcing promises.” *Calif. L. Rev.*, vol. 83, 1995, p. 547.

facilem historiarum cognitionem"[528] expanded on his theories of sovereignty, emphasizing the importance of *utilitas* as a guiding principle for state intervention in private affairs. Instead of overhauling the Public as an extension of the king's mystical attributes, a more rationalized inflection of the State assumed force, claiming the State undertaking more roles than previously manorial Law would allow.

Consequently, the erosion of will theory, articulated by Gilmore, is a product of the nineteenth-century reading of the outreaching effects assumed by the Public domain when the State has increasingly assumed responsibility for promoting justice and fairness in contractual dealings, particularly in situations where power imbalances exist. As mass society gives rise to more complex and asymmetric relationships[529], the challenges of risk allocation become ever more pressing, necessitating state intervention to address the inequalities perpetuated by boilerplate clauses and excessive power exercises by stronger parties[530].

The anxieties expressed in liberal criticisms pivot around the emergence of a 'total constitution' or a 'total state'[531]. The advent of an all-encompassing constitution implies the concept of private freedom becoming an elusive luxury, no longer accessible to the common individual. This profound notion finds its essence encapsulated within the subsequent excerpt elucidating Schmitt's philosophy. the suppression of freedoms, once taken for granted, could become scarce or non-existent:

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[528] Bodin, Jean. *Methodus ad facilem historiarum cognitionem [1566]*, edited and translated by Sara Miglietti. Edizioni della Normale, 2013. p. 388.

[529] Beck, Ulrich. *Risk Society: towards a new modernity [1986, Risikogesellschaft: Auf dem Weg in eine andere Moderne*], translated by Eng. Mark Ritter. Sage, 1992. pp. 106-107.

[530] Radin, Margaret Jane. "The deformation of contract in the information society." *Oxford Journal of Legal Studies*, vol. 37, no. 3, 2017, pp. 505-533. See also Ibbetson, D. J. *A Historical Introduction to the Law of Obligations*. Oxford University Press, p. 248: "The principal cross-current playing against the Will Theory was the idea that the law ought to strive towards a goal of achieving justice or avoiding injustice, rather than simply giving effect to the agreement of the parties."

[531] See Schmitt, Carl. "Die Wendung zum totalen Staat." *Europäische Revue*, vol. 7, no. 4, 1931, pp. 241-250. He develops the same argument again in Schmitt, Carl. *Legality and legitimacy, [1932, Legalität und Legitimität]*, translated by Eng. Jeffrey Seitzer. Duke University Press, 2004. p. 6: "Moreover, our state form is undergoing a transformation, and the 'turn toward the total state' characteristic of the moment (instead of, a hundred years ago, toward 'freedom') seems typical today of the turn toward the administrative state."

> *"First, the idea of an autonomous domain of private law as an integral part of an apolitical state-free sphere had collapsed. The belief in a civil society that organizes itself by means of private law, the content of which is defined by apolitical legal experts, no longer resonated. Private law, too, had become the object of self-conscious, broad-based political struggle. Private law was wrested from the legal priesthood and became a mundane object of regulatory intervention. The 19th century ideas of scholarly mandarins, who conceived of private law in natural law, historicist, or conceptual terms or thought of the code as the authoritative embodiment of legal rationality, were replaced by ideas that private law, too, was subject to political choice."*[532]

Another scholar who contributed to the development of theories exercising great effect on contractual theory is Schmitt. He was, indisputably, the legal theorist of the exception in twentieth century thought, but lesser-known aspects of Schmitt's works unearth hidden correlations between the demise of will theory and the State's intervention in private contractual disputes when confronted by challenges arising from that relation. On this new political frontier, everything is politically up for grabs. The distinct benefits once associated with the advent of liberalism are increasingly obfuscated by the encroaching totality of the state[533]. This train of thought, meticulously developed by Schmitt[534], garners attention from a considerable contingent of private law scholars. They hold a vested interest in maintaining this demarcation line, cognizant that the collapse of the structure, birthed in the ascendancy of the bourgeoisie, could precipitate profound consequences.

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[532] Kumm, Mattias. "Who is afraid of the total constitution? Constitutional rights as principles and the constitutionalization of private law." *German Law Journal*, vol. 7, no. 4, 2006, pp. 341-369. p. 341.

[533] MacIntyre, Alasdair. "The privatization of good: An inaugural lecture." *The Review of Politics*, vol. 52, no. 3, 1990, pp. 344-361.

[534] Schmitt, Carl. *The Crisis of Parliamentary Democracy [1923, Die geistesgeschichtliche Lage des heutigen Parlamentarismus]*, translated by Ellen Kennedy. Massachusetts Institute of Technology Press, 1985. pp. 24-25: "If all political tendencies could make use of democracy, then this proved that it had no political content and was only an organizational form; and if one regarded it from the perspective of some political program that one hoped to achieve with the help of democracy, then one-had to ask oneself what value democracy itself had merely as a form—The attempt to give democracy a content-by transferring it from the political to the economic sphere did not answer the question. Such transferences from the political into the economic are to be found in numerous publications. […] In truth this signifies an essential change in the concept of democracy because a political point of view cannot be transferred into economic relationships as long as freedom of contract and civil law hold sway in the economy. Max Weber had already argued in his article "*Parliament und Regierung im neugeordneten Deutschland*" (1918) that the state was sociologically just another large business and that an economic administrative system, a factory, and the state are today no longer essentially different. […] But a political form of organization ceases to be political if it is, like the modern economy, based on private law." Also in Weber, Max. "Parliament and government in Germany under a new political order." *Weber: Political Writings*, vol. 130, 1994, pp. 147-148.

In the notes of "The Concept of the Political"[535], Schmitt evidenced a thought-provoking perspective on the nature of the political as opposed to the present dichotomy in contract Law, recurring to contract Law roots of exploitation. Parties bestow to the State's mediator role to distribute and allocate power designates the boundaries between the stronger and weaker parties, thus demarcating the line between the legitimate exercise of power and the abuse of it, crafting contractual relations as a formidable *apparatus* to settle the same sort of disputes as the ones emerging from the political discourse.

As Heidegger lengthily discussed on the effects of Aristotelian causes by which technology offers an empty fulfilment of ends[536], he suggested that technology often provides a hollow realization of intended outcomes. In a parallel vein, Schmitt identified the shift from theological and metaphysical societies to technologically driven ones as leading to a state of unawareness regarding the genuine threats societies face. This oblivion pertains especially to the perception of technology as a pacifying mechanism for people, irrespective of whether this technology manifests through economics, law, contracts, or other means. Schmitt warned about the veiled rules of this language, stating that the most horrific wars are waged only in the name of peace, the most severe oppression only in the name of freedom, and the most abhorrent inhumanity only in the name of humanity.

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[535] Schmitt, Carl. *The concept of the political: expanded version*, [1932, translated by Matthias Konzett and John P. McCormick from "Das Zeitalter der Neutralisierungen und Entpolitisierungen" in Carl Schmitt, Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien, Berlin: Dunker & Humblot, 1963]. Chicago University Press, p. 19. Here pp. 76-77: "The best example of this polarity of state and society is contained in the theses of Franz Oppenheimer. He declares his aim to be the destruction of the state. […] The connection of politics with thievery, force, and repression is, in the final analysis, no more precise than is the connection of economics with cunning and deception. Exchange by no means precludes the possibility that one of the contractors experiences a disadvantage and that a system of mutual contracts finally deteriorates into a system of the worst exploitation and repression. When the exploited and the repressed attempt to defend themselves in such a situation, they cannot do so by economic means. Evidently, the possessor of economic power would consider every attempt to change its power position by extra-economic means as violence and crime, and will seek methods to hinder this. That ideal construction of a society based on exchange and mutual contracts and, eo ipso, peaceful and just is thereby eliminated. Unfortunately, also, usurers and extortioners appeal to the inviolability of contracts and to the sentence pacta sunt servanda. The domain of exchange has its narrow limits and its specific categories, and not all things possess an exchange value. No matter how large the financial bribe may be, there is no money equivalent for political freedom and political independence."

[536] Heidegger, Martin. *The question concerning technology*. New York, 1977, p. 214.

The Private Law was conceived as the space where individuals could exercise their sovereignty[537]. One stage that needed to be accomplished was to set a separation of rights and remedies. In the continental tradition, such a distinction was made possible by the *Droit Subjectif* emergence[538]. That separation enabled the concept of remedies to recede, or at least to be distinguishable from the rights themselves, a facet received differently in the common law tradition. However, the aspect of importance in this regard is the implications of the Public Private Law divide. This valuable fiction lost its appeal as the Public entrenched itself in private endeavors. At the same time, some private parties assumed an increasing role as a ruler[539].

The feudal period did not provide clear boundaries on the extent of seignorial exercise[540], often blurring the lines between public authority and private dominion. Lords wielded power and justice within their fiefdoms, with an amalgamation of public and private roles. As society progressed towards more defined and separate spheres of public and private influence, the traces of this feudal ambiguity lingered. The remnants of this period still echo in the modern legal framework, where identifying the extent and limits of the power wielded by private parties, especially within contractual relationships, becomes a critical issue. This is particularly pertinent in instances where private entities assume roles traditionally ascribed to public institutions, rekindling an age-old dialectic of power and jurisdiction within the complex tapestry of law.

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[537] Also, the idea of Public instead of absolute was born from the same drives, see Kelsen, discussing the majority principle in his Kelsen, Hans. *The essence and value of democracy*, [Vom Wesen und Wert der Demokratie], translated by Brian Graf. 2013, p. 70: "Compromise means favoring that which binds over that which divides those who are to be brought together. Every exchange and every contract represents a compromise, because to compromise means to get along [vertragen]."

[538] Samuel, Geoffrey. "Le droit subjectif and English Law." *The Cambridge Law Journal*, vol. 46, no. 2, 1987, pp. 264-286.

[539] Almeida Ribeiro, Gonçalo de. *The Decline of Private Law: a philosophical History if Liberal Legalism*. Hart Publishing, 2019. p. 133.

[540] Cohen, Morris R. "Property and sovereignty." *Cornell LQ*, vol. 13, 1927, p. 8. Cohen, Morris R. "The basis of contract." *Harv. L. Rev.*, vol. 46, 1932, p. 553. Ibbetson, David. "From property to contract: The transformation of sale in the Middle Ages." *The Journal of Legal History*, vol. 13, no. 1, 1992, pp. 1-22: "The essence of feudal law-a system not confined to medieval Europe-is the inseparable connection between land tenure and personal homage involving often rather menial services on the part of the tenant and always genuine sovereignty by the landlord."

When the riches belong to and are concentrated in the hands of a few lords, the entrenchment of otherness entitlements is based on the equality of transactions they can enter and exchange. In a world order divided between peasants and landlords[541], there was no need to articulate a system of justice in which impartial third parties adjudicate disputes since the solution will be imposed by the party with the powers to enforce the outcomes[542].

As Peter Goodrich brings to the discussion, Janus is presented as a metaphor or the epitome of the Roman duality of godly transitions with a dual-faced visage[543]. The bifurcation assigned for the private and the Public encapsulated divergent interests, objectives, and paradigms that govern the spheres of public and private Law. The perfomative sense of an iPhone or the discontinued Blackberry in the bedroom vanishes with the secrecy of the Private realm, as opposed to the accustomed public mask unraveled. The void left many theological categories abandoned since the transfer of the sovereign's mystical body was destined to the *res publica*.

The concept of the king's two bodies, as expounded by Kantorowicz[544] and further investigated by Santner[545], while analyzing the metamorphosis occurred between the theological roots of public Law and the secular progression of Private Law offers valuable clues to justify the rotting separation of the realms. This intricate relationship is embodied by

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[541] A reference to Schimitt closure of "Das Zeitalter der Neutralisierungen und Entpolitisierungen" in Schmitt, Carl. *The concept of the political: expanded version*, [1932, translated by Matthias Konzett and John P. McCormick from "Das Zeitalter der Neutralisierungen und Entpolitisierungen" in Carl Schmitt, Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien, Berlin: Dunker & Humblot, 1963], Chicago University Press. p. 96. "Ab integro nascitur ordo."

[542] See Maitland, F. W. *The Constitutional history of England: a course of lectures*, edited by H. A. L. Fisher. Cambridge University press, 1961. See also Supiot, Alain. "The public–private relation in the context of today's refeudalization." *International Journal of Constitutional Law*, vol. 11, no. 1, 2013, pp. 129-145.

[543] Goodrich, Peter. "The political theology of private law." *International journal of constitutional law*, vol. 11, no. 1, 2013, pp. 146-161.

[544] Kantorowicz, Ernst H. *The King's Two Bodies: a study in mediaeval political theology*. Princeton University Press, 1957. p. 193.

[545] Santner, Eric L. *The royal remains: The people's two bodies and the endgames of sovereignty*. University of Chicago Press, 2011. xii.

the mystical wax transmission ritual, which serves as a conduit for divine authority and temporal power, bridging the metaphysical and material aspects of governance.

The ensuing transformation of public Law, with its theological underpinnings, has, in turn, shaped the trajectory of private Law, steering it away from ritualism and towards a more contractual framework. This ritual exemplifies the theological support of public Law and its relationship to *res publica*. In contrast, the evolution of private Law has witnessed a shift from ritualism to a contractual framework, transforming the dynamics of interpersonal relationships and transactions. The sumptuous king's public vest was momentarily transferred to the constitutional metaphorical wax tablets and later crackled by the infiltration of the private into the Public and vice-versa.

Concelead in all the transfers of authority resorted the attempt to add the complexity of a reality merely addressing the decaying sovereign corpse that needed to be heralded but at the same time erased from the public eye to avoid leaving the void of the absent king open for public scrutiny. The bourgeoise camouflaged its exploitation instruments and contractual and proprietary apparatus through Private Law legal institutions and operations once the sovereign's excesses negatively impaired the public. No relation was exploitative as long as it was vested with freedom and free choice.

In recent years, however, the demarcation between public and private Law has become increasingly blurred, calling into question the validity of the Janus metaphor. The convergence of contract law, traditionally a bastion of private Law, and regulations, a quintessential aspect of public Law, triggered a shifting landscape, highlighting how the growth of regulatory frameworks and judicial interventions in contractual relationships challenge the once-distinct spheres of public and private Law, giving way to a more fluid, interconnected legal landscape. As it will be clarified, granular Law performs as this bridge of an undistinct scenario.

Among the multiple leading cases that could open the discussion on the role of the State in correcting the asymmetries among parties, one of the most elusive regard Lochner v. New York[546]. A remarkable decision before the New Deal set the stage for a zone of contact between Public and private spheres. It also endowed a promising dissent opinion from Justice Holmes that would pave the way for the realist movement.

The majority opinion delivered by Justice Peckham acknowledged the State's necessary contractual interference while dealing with the "safety, health, morals and general welfare of the public."[547] . However, regardless of the general propositions favoring public police, the opinion clearly stated as its motto: "*The general right to make a contract in relation to his business is part of the liberty protected by this amendment, unless there are circumstances which exclude the right*."[548]

On the other hand, Justice Holmes's famous statement, "*General propositions do not decide concrete cases*" arose from this sentiment that the liberty granted to private parties was excessive and, therefore, should be controlled by judicial review. In his dissent, he brought multiple examples of how the freedom of contract has always been balanced by policies and endeavored on whether or not he should rely on such fashionable economic theories of his time. He remarked:

> "*This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in Law. It is settled by various decisions of this court that [state laws] may regulate life in many ways which we as legislators might think as injudicious or, if you like as tyrannical as this, and which equally with this interfere with the liberty of contract. Sundays laws and usury laws are ancient example*."[549]

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[546] Lochner v. New York, 198 U.S. 45 (1905). See also KENS, Paul. Lochner v. New York: Tradition or Change in Constitutional Law. NYUJL & Liberty, 2005, 1: 404.
[547] Sullivan, Kathleen M; Gunther, Gerlad. *Constitutional Law*, 16th ed. Foundation Press, 2007. p. 366.
[548] Ibid.
[549] Ibid, p. 370.

The winds of change would also be felt in England. In his work "*The Discipline of Law*," Lord Denning comments on the decision in Central London Property Trust Ltd v. High Trees House Ltd, a landmark case that exemplified the development of the doctrine of promissory estoppel[550]. Lord Denning argued that the validity of a promise to accept a smaller sum in the discharge of a larger one should be recognized, even in the absence of consideration. This perspective challenges the traditional common law requirement of consideration as a precondition for the enforceability of a contract, suggesting that the fusion of Law and equity might give rise to a more equitable outcome.

The High Trees case involved a lease agreement in which the landlord agreed to accept a reduced rent due to wartime hardships. When the circumstances changed, the landlord sought to revert to the original rent, but the court held that the landlord was estopped from doing so. The absence of consideration did not impede the enforceability of the lower rent, as the court recognized the importance of the parties' intentions and reliance on the promise. That demonstrates that in certain situations, equity may prioritize the will and intentions of the parties over rigid legal formalities, such as consideration. The role of the will in shaping equitable outcomes highlights the flexibility and adaptability of equity in addressing the unique circumstances of individual cases, promoting justice and fairness in contractual relationships. According to Denning's own words on estoppel:

> *"Looking back over the last 32 years since the High Trees case, it is my hope that the principles then stated – and the extensions of them - will come to be accepted int he profession. The effect has been to do away with the doctrine of consideration in all but a handful of cases."*[551]

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[550] Lord Denning, Alfred Thompson. *The Discipline of Law*. Butterworths, 1979. p. 205: “In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt, is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, us binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better.”

[551] Lord Denning, Alfred Thompson. *The Discipline of Law*. Butterworths, 1979. p. 223.

He disregarded consideration in favor of good faith, of words that should not contradict itself because it lacked consideration. Nevertheless, underlying the situation that led to the decision, a sense of sensibility changed the juridical order of England. The state's move away from the Will Theory, which emphasizes individual autonomy and the binding nature of contracts, has corrected asymmetries in bargaining power and rights, in line of a more socialist perspective in contractual law. By incorporating exceptions and doctrines, the law has evolved to address power imbalances and provide equitable outcomes for parties in legal disputes.

II.III. Codification Movement: towards granular Law Over Universalism

The present topic is built on a critique of certain pervasive tendencies in the legal scenario. As explained, although the codification movement did not fulfill societal expectations of ensuring a more conforming system to equality and certainty, the replacements appear more deceitful than the former. Codification provided the legal structure for the bourgeoise enterprise, accelerating the speed of exchanges thanks to a necessary standardization of solving legal disputes.

Regardless of how fruitful it was, the pace of evolution of the legal arena, with the intensification of the circulatory process through transboundary operations[552], challenging the force of the sovereign state, required the revamping of rules to create a more "*tailored*" system[553]. The rebranding process captivates the attention of jurists, who celebrate this process

[552] Wigmore, John Henry. *A Panorama of the World's Legal Systems*, vol. III. West Publishing Company, 1928. p. 914: "But with the period of the 1600's a new stage is entered. As time went on, and nations were being organized, this unique common law of the sea was breaking up. The 1600's was the period of nationalization of law all over Europe." Wigmore proposed an innovative perspective of legal unification through the enactment of maritime codes, starting with Denmark with Frederic II's Maritime Code of 1561. Those maritime compilations constituted the most relevant system for experiencing with command-binding rules provided certainty for sailors and merchants operating in those devices of transactions.

[553] Casey, Anthony J.; Niblett, Anthony. "The death of rules and standards." *Ind. LJ*, vol. 92, 2016, p. 1401.

as positive and unavoidable, using the discourse of the emergence of a brave new world of chances[554].

Meanwhile, real issues are concealed through abstractions that leave them apart from discussions, suppressed from public acknowledgment and proper debate. That regards addressing matters such as if the Sovereign is not the authority pronouncing the Law, who is responsible for enacting binding commands? Or else, if the forms of actions were a fundamental chapter of substantial and procedural legal history, what are the consequences of a shift of adjudication? The analogy of merging hardware and software applies here. Law is coupled with the way of resolving disputes, and the vanishing trial through the merging of substance and procedure will affect how the systems function or malfunction. When cases are hidden from the public eye in chambers of commerce or arbitration branches, the degradation of the legal technique does not appear as threatening as it might be. However, when it assumes an undisputable nature, affecting every private relation of society, when multiple parties

[554] Ashley, Kevin D. *Artificial Intelligence and Legal Analytics: new tools for law practice in the Digital Age*. Cambridge University Press. p. 7. Way before artificial intelligence made the definitive turn to consolidate itself as the new normality of Law, the author was developing analytical juridical models to be run by algorithmic code in an unprecedented manner in the legal literature. He presents the challenges of dealing with systems known as Westlaw and the not-so-recent anymore Watson. Integrating machine learning and natural language processing techniques to enable AI systems to "learn" and "understand" legal reasoning patterns will provide what Susskind and Henderson describe as standardized and commoditized legal products. See HENDERSON, William D. A blueprint for change. *Pepp. L. Rev.*, 2012, 40: 461, and also SUSSKIND, Richard; Daniel. "Tomorrow's Lawyers: An Introduction to Your Future," Oxford: Oxford University Press, 2022, pp. 256. The process of commoditization follows the patterns of craft, standardization, systematization, and externalization; once this last one is reached, it follows charge online, no-charge online, and finally, commons. That process resembles the disclosure of *legis actio* in 250 B.C., in which the *pontifex maximus* pierced the veil of the *formula* and degraded its previous value. Technological disruptions are squeezing the limited space reserved for the legal elites, which becomes, in their turn, progressively more elitist. WATSON, Alan. *Sources of Law, legal change, and ambiguity*. University of Pennsylvania Press, 1998, pp. 3. For the development of *legis actio* see BUCKLAND, William Warwick. *A text-book of Roman law: From Augustus to Justinian*. University Press, 1921, p. 605: “The law of actions is the law of litigation, the law governing the submission of claims to a tribunal for settlement. But it must not be forgotten that legal remedies in Rome originated in self-help, and that early Roman Law did not regard litigation as essential to the conception of an“actio.” Both Gaius and Justinian start from the conception of the Law of Actions as the Law of Remedies, Adjective Law, but depart from this notion in the actual treatment. The substantive praetorian law (there was no civil law on the matter) as to liability of the paterfamilias on transactions by members of the familia, or business agents (institor, magister navis), and the law, civil and praetorian, on his liability for wrongs committed by members of the familia (noxal liability), both logically belonging to the law of obligations, are treated under actions, and practically all that we hear of purely possessory rights is said in connexion with interdicts.”

demand jurisdictional functioning to solve questions surpassing private interest, it becomes evident that the system is overloaded and unable to react.

Previously, people were assigned to specific ranks based on their social status[555]. Contracts were lateral in necessity due to the insignificant deployment of contracts as the means of circulation in a society lacking currency as an anonymizer of transactors' identity. The seal, the oath, with its magical characters[556], presupposed parties' involvement, not on behalf of its inclinations, but for whom they represented in society: the father, the landowner, the knight. Just a remote parcel of merchants and bankers started operating a system in which the circulation of goods and bills was possible. The land belonged to the lord, while the serfs were bound to serfdom. Kinship relations ignored the need for distinguishing rights *in rem* and *in personam*[557] since all relations traversed property rights entitlements.

As society progressed, this system was abandoned and replaced with a new division between proletarians and those who owned the means of production. Despite these changes, individuals still had limitations on their freedom of transaction based on their assigned societal role. Those limitations were based on previous accumulation to which individuals entered the new social-economic arrangements. Landowners could easily convert their wealth and prestige to new enterprises, such as colonial exploration or assembling industrial endeavors, to diversify their earnings once the crown was not available to finance landownership for the simple sake

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555 Holdsworth, W. S. *A History of English Law*, vol. II, Methuen & CO., 1909. pp. 26-27: "*The man who has a large number of kindred is the man entitled to the highest rank. The descendants of others - strangers or manumitted slaves - do not attain to the highest rank till they have attained the full number of kindred*." Referring that as a primitive organization, the author proceeds to point out the model that would reign during feudal times, p. 28: "*But at the end of the Saxon period, though we may still see traces of old ideas, society is no longer organized on this basis. The two principles which supplant the old ideas are the principles of wealth and official employment in the service of the king. As the state becomes feudalized these two principles shade off into one another*."

556 Weber, Max. *Law in Economy and Society*, [1925 tr. from Wirtschaft und Gesellschaft]. Harvard University Press, 1954. p. 106: "The oath, which originally appears as a person's conditional self-surrender to evil magical forces, subsequently assumes the character of a conditional self-curse, calling for the divine wrath to strike. Thus the oath remains even in later times one of the most universal forms of all fraternization pacts." See also Tuori, Kaius. "The magic of mancipatio." *Revue internationale des droits de l'Antiquité*, vol. 50, 2008, pp. 499-521.

557 Weber, Max. *Law in Economy and Society*, [1925 tr. from Wirtschaft und Gesellschaft]. Harvard University Press, 1954. p. 112.

of maintaining the former order[558]. In that sense, those already ahead were the frontrunners of capitalistic accumulation. Supiot underscored the idea of refeudalization to point out a baffling aspect of the unveiling Law with its "*bourgeois legality*," implemented with authoritarian force during the Nazi-fascist regimes but rebranded as a "spontaneous order," deemed to be granular and tailored for the needs of the involved parties[559].

Contractual interactions, as observed by Max Weber, occupied only a minor portion of individuals' life experiences, especially in the context of family and inheritance law:

> *"The 'contract,' in the sense of a voluntary agreement constituting the legal foundation of claims and obligations, has thus been widely diffused even in the earliest periods and stages of legal history. What is more, it can also be found in spheres of law in which the significance of voluntary agreement has either disappeared altogether or has greatly diminished, i.e., in public law, procedural law, family law, and the law of decedents' estates. [...] The present-day significance of contract is primarily the result of the high degree to which our economic system is market-oriented and of the role played by money."*[560]

Examining feudal societal structures, where class rank and the absence of currency were critical factors in exerting any degree of autonomy, the institution of the fief holds a significant

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[558] Supiot, Alain. *Governance by numbers: The making of a legal model of allegiance*, translated by Saskia Brown. Bloomsbury Publishing, 2017. p. 86: "The Roman censor's primary function was to provide the sovereign with knowledge of human and material resources, and thus to contribute to the country's political economy, dissolving the limit Aristotle had drawn between the oikos and the polis, and treating state administration on the one hand, and the management of a company or a family on the other in the same terms. The most important knowledge provided by the censors was that of the distribution of wealth within the population, this being, ever since the Middle Ages, construed as a 'mirror of the Prince' in the same way as accounting was a 'mirror of the merchant'. It allowed the monarch to gauge his own importance and that of his kingdom. The metaphor of the mirror was also used to refer to the first codifications of laws; for example, the famous *Sachsenspiegel,* the mirror of the Saxons, a code of laws in Middle Low German. Whereas the mirror of the laws composed the image of an ideal order for the sovereign and his subjects to contemplate, the mirror held up by the censors was supposed to present the kingdom as it really was." Similar argument was developed in SCOTT, James C. Seeing like a state: How certain schemes to improve the human condition have failed. yale university Press,1998, p. 36: "The rulers of postrevolutionary France confronted a rural society that was a nearly impenetrable web of feudal and revolutionary practices. It was inconceivable that they could catalogue its complexities, let alone effectively eliminate them, in the short run. Ideologically, for example, their commitment to equality and liberty was contradicted by customary rural contracts like those used by craft guilds, which still employed the terms "master" (maître) and "servant" (serviteur). As rulers of a new nation-not a kingdom-they were likewise offended by the absence of an overall legal framework for social relations. For some, a new civil code covering all Frenchmen seemed as if it would be sufficient."

[559] Supiot, Alain. "The public–private relation in the context of today's refeudalization." *International Journal of Constitutional Law*, vol. 11, no. 1, January 2013, pp. 129–145. See also Resnik, Judith. "Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century." *International Journal of Constitutional Law*, vol. 11, no. 1, January 2013, pp. 162–199.

[560] See Weber, Max. *Law in Economy and Society*, [1925 tr. from Wirtschaft und Gesellschaft]. Harvard University Press, 1954. p. 105.

place in legal history since it exercised its role as a transitional phase towards a different organizational system. Despite its limitations, the fiefdom facilitated the initial flow of value from the recipients to the emergent liberal professions. In addition, it conferred upon the state the ability to oversee these transactions, as the claims were submitted to the treasury office, an entity intrinsically tied to the crown's wealth[561].

Different factors contributed to the capitalistic mode of production, assuming the prevalent way of organizing society. England's enclosure movement from the 15th to the 19th century marked a significant transition from feudalism to a market-oriented economy, laying the groundwork for industrial capitalism[562]. However, this process could only be accomplished with the legal production accompanying it. The crafting of legal devices enabled capitalism to consolidate as the dominant system[563].

The codification of laws brought uniformity, predictability, and transparency, which were fundamental for functioning complex capitalist economies[564]. Key principles of contract law, such as mutual assent, consideration, the insertion in the market of entitlements previously appertaining to restricted groups, letters of credit, and the state's granting capacity under broad requisites such as age, became more clearly defined and universally applicable. These principles underpinned all contractual agreements and have been instrumental in shaping the modern capitalist system. The development of these legal norms and structures constitutes the kernel to the functioning of capitalism and its ultimate emergence as the dominant global economic system.

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561 Lyon, Bryce D. *From fief to indenture: the transition from Feudal to Non-Feudal Contract in Western Europe*. Harvard University Press, 1957. p. 245.

562 Polany, Karl. *The Great Transformation*. Beacon Press, 1944. p. 71.

563 Proudhon, Pierre-Joseph. *Idée générale de la révolution au XIXe siècle : (Choix d'études sur la pratique révolutionnaire et industrielle)*. Garnier Freres, 1851. p. 138 : “Tous les chemins vont à Rome, dit le proverbe. Toute investigation conduit aussi à la vérité. Le dix-huitième siècle, je crois l’avoir surabondamment établi, s’il n’avait été dérouté par le républicanisme classique, rétrospectif et déclamatoire de Rousseau, serait arrivé, par le déclamatoire de Rousseau, serait arrivé, par le développement de l’idée de contrat, c’est-à-dire par la voie juridique, à la négation du gouvernement. »

564 Horwitz, *The transformation of American law*, esp. p. 160–210.

On the other hand, the birth of capitalism witnessed the multiplying effect of fortunes, especially in the new world where social constraints were absent from exercising a deterrent effect in the lower's strata of society. Concomitantly, the philosophy of existentialism offered a new way of thinking about social organization, where individuals could make choices for themselves. They were free to choose whether to contract or not and to participate in the industrialization of cities without being bound by previous social inhibitions.

Contracts became the technology of liberalism[565], allowing people to make autonomous choices and providing them with certainty and predictability about the outcomes of their decisions[566]. The focus was on individual rights and freedoms, ultimately leading to a greater sense of autonomy and independence.

To the lord the land, to the serf serfdom[567]. When society abandoned those former ways of organizing labor, society was divided between proletarians and holders of the means of production. For all, though, the system allowed the freedom of transaction given the limitations the system assigned for each individual. To integrate society into new values, detached from previous religious constraints. The rational system offered by Weber, exposing the

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[565] Friedman, Lawrence Meir. *The republic of choice: Law, authority, and culture*. Harvard University Press, 1990. p. 27.

[566] Porat, Ariel; Strahilevitz, Jacob. "The Concept of Personalized Law." *Algorithmic Regulation and Personalized Law*, edited by Christoph Busch and Alberto De Francesco. Contracts, Nomos/Hart/Beck, 2021. p.5. Contracts are impersonal as much as Law is.

[567] Fairfield, Joshua AT. *Owned: Property, privacy, and the new digital serfdom*. Cambridge University Press, 2017. p. 13: "*One system is feudal: the king owns everything, a few dukes and barons manage big chunks of the king's land, and everyone else is an underling at best, a serf at worst. The other system is free: individuals can, within reasonable restraints, do as they wish with their own resources and tools. The feudal system is centralized. The free system is decentralized. The feudal system relies on a few rich and many poor. The free system relies on many people having enough. The feudal system relies on command and control. The free system relies on, well, freedom, backed by good rules and reasonable legal limits to handle disputes between neighbor*." Fairfield's comparison presents a mesmerizing juxtaposition between the centralized control of a feudal system and the decentralized freedom of a 'free' system. This dichotomy, deeply rooted in historical societal structures, underlines the pervasive influence of feudal hierarchies on our general conceptualization of ownership and power dynamics. The feudal paradigm, characterized by stark social stratification and the concentration of resources among the elite, serves as a stark contrast to the envisioned 'free' system, where autonomy and equitable distribution of resources are valued. The main argument he presents regards the setback to the enjoyment of entitlements that seemed to be conquest by a liberal framework. The rule of law ensured due respect for freedoms and excessive exercise of power. What the unfolding of a new world is presenting instead is a rule-based system that imposes consent and erases previous achievement for the underdog.

advancement from "*status contracts*" to "*purposive contracts,"* assumes that *"freedom in the legal sense means the possession of rights, actual and potential, which, however, in a marketless community naturally do not rest predominantly upon legal transactions but rather directly upon the prescriptive and prohibitory propositions of the law itself*."[568]

Weber presented a picture that would constitute a broader image for describing the Philosophy of existentialism[569], a system of thinking that offered responses for a novel social organization's framing, in which choices could be taken outside the extremely limited scope previously existent. Individuals were entitled to decide whether or not to contract, whether living in the city and participating in social shares of industrialization, untied from previous bounds that prevented individuals from ascertaining individual rights. In that regard, contracts are the utmost technology of liberalism, enabling parties to make autonomous choices. They ascended to that position with all discursive grammar accompanying it, autonomy, freedom, certainty, and predictability of its outcomes[570]. The individual operating the juridical system was pre-informed through transmission on how society should function contained in codes and leading precedents.

The development of the will theory in contract law was deeply influenced by the broader intellectual movement that revolutionized our understanding of the human mind.

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[568] Weber, Max. *Law in Economy and Society*, [1925 tr. from Wirtschaft und Gesellschaft]. Harvard University Press, 1954. p. 100.

[569] Bonsignore, John J. "Existentialism, the Rule of Law and Article 2 of the Uniform Commercial Code." *Am. Bus. LJ*, vol. 8, 1970, pp. 133-138: "An existentialist would differ from Weber on important particulars. He would debate the ability to construct a rational scheme to encompass a changing real world. However ambitious the design, he would argue that there will always be a gap between the official world and the real world. As a decision process, he would cite the serious deficiencies of formal rationality. What appears to be an unbiased, disinterested and objective appraisal of the individual case is in the eyes of existentialist a hypocritical avoidance of the awful uncertainties inherent in the judging process."

[570] A process initiated by theologians with diverse goals. See Decock, Wim. *Theologians and contract law : the moral transformation of the "Ius commune" (ca. 1500-1650)*. Martinus Nijhoff Publishers, 2013. p. 635: "This preoccupation with the soul gives theologians' contract doctrine an outlook which is more 'medieval' than 'modern'. even when the results of the theologians' sophisticated argumentations sometimes look surprisingly modern, one should bear in mind that the reasons behind their standpoints were significantly alien to modern thinking. For example, 'freedom of contract' may well have been of central value to the theologians, particularly to the Jesuit scholastics, but what motivated them in advocating consensualism and freedom in contracts was the salvation of souls. The contemporary rationale behind 'freedom of contract' is the smoothness of commerce."

Pragmatism was discussed in the eminent social circles of Massachusetts, one of which Holmes was part, and who would influence the whole juridical field[571].This movement, which also included the works of John Dewey and William James, as well as the discussions at the Metaphysical Club, placed a greater emphasis on human agency, individual will, and subjective intent[572]. Theories appeared to provide meaning to the new focus on the individual's role in shaping society[573], and the Law absorbed those discussions, incorporating them in the conceptualization of contracts. Rather than viewing contracts as mere legal constructs, the will theory posited that contracts should be understood as the manifestation of the parties' intentions and desires.

Struggles afflicting continental Europe exercised mutual influence in the U.S. formative years. Napoleon's defeat challenged the codification movement that swiped Europe during his rule, while movements confronting the codification attempt provided competing theories that would assume the orthodox codified advantage. A micro picture of those intellectual clashes was evidenced in the effort to produce a civil codification for New York, a failed attempt there but successful, for instance, in Louisiana[574]. The prevalent model's unraveling could not be taken for granted since it was yet to be decided. Indeed, it was not yet ascertained that the rigidity provided by a code could regulate an increased accelerated speed of change affecting society in all walks of social life. There are no logical implications in assuming that codification must have followed from the abstraction of ideas as a result of scientific awareness regarding the law. The rediscovery of Roman sources and its interest in legal scholars could be well

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[571] Fisch, Max H. "Justice Holmes, the prediction theory of law, and pragmatism." *The Journal of Philosophy*, vol. 39, no. 4, 1942, pp 85-97.

[572] Menand, Louis. *The Metaphysical Club: A Story of Ideas in America*. Farrar, Straus and Giroux, 2001. pp. 123-126.

[573] Pound, Roscoe. *Interpretations of legal history*. Macmillan, 1923. p.11: "Pragmatism sees validity in actions, not in that they realize the idea, but to the extent that they are effective for their purpose and in purposes to the extent that they satisfy a maximum of human demands."

[574] Reimann, Mathias. "The historical school against codification: Savigny, Carter, and the defeat of the New York Civil Code." *The American Journal of Comparative Law*, vol. 37, no. 1, 1989, pp. 95-119. See also Pound, Roscoe. *Interpretations of legal history*. Macmillan, 1923. p.14.

addressed by other modes of legal production not clustered in a code. Special statutes and doctrinal exposition could have served to refine legal institutions that found philosophical grounds in scientific advancements, such as a better understanding of mental processes.

The legal landscape began to evolve as courts increasingly recognized the importance of mutual assent, subjective intent, and individual autonomy in determining the enforceability of contracts. This transformation can be seen in cases such as Lucy v. Zehmer [575], which emphasized the significance of the parties' subjective intentions in the formation of a contract, highlighting the growing recognition of the will theory in contract law.

Alongside these developments, despite the refusal of codifying subjects as it happened in Europe, the spirit of codification also played a crucial role in shaping the concept of autonomy in the new liberal world, as it provided a more precise framework within which individuals could exercise their freedom to enter transactions. The theory of codification in Europe marked a significant shift in how legal systems were organized and understood. With the rise of codification, a more systematic and unified approach to Law emerged, aiming to bring clarity, predictability, and uniformity to legal relationships[576].

While engaging in the explanation of legal tradition as "*chthonic*", Patrick Glenn warned about the risk taken by Savignyan's "*Folk Law*" turning into a "*folk lore*," folklore[577].

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[575] 84 S.E.2d 516, (Va. 1954). This case presents the challenge confronted by courts to assert the just value of a transaction. The court found the presence of consideration recognizing the deal entered by the parties from a night in which the parties were alcohol intoxicated in a restaurant and wrote the agreement in the back of a receipt. For a deeper evaluation of this well-known contract case see Richman, Barak; Schmelzer, Dennis. "When money grew on trees: Lucy v. Zehmer and contracting in a boom market." *Duke LJ*, vol. 61, 2011, p. 1511 and Rowley, Keith A. "You Asked for It, You Got It... Toy Yoda: Practical Jokes, Prizes, and Contract Law." *Nev. LJ*, vol. 3, 2002, p. 526.

[576] Glenn, H. Patrick. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford University Press, 2000. p. 125.

[577] Tuori, Kaarlo. *Ratio and Voluntas: the tension between reason and will in law*. Routledge, 2016. p. 79: "Savigny and Puchta were well aware of the societal and cultural differentiation that characterises legal modernisation. Savigny argued that originally all law is 'popular law' (Volksrecht). In the development of the nation, the law adopts a 'scientific' direction, loses its original simplicity and escapes from the reach of the people as a whole. The general tendency is that 'as the culture develops, all the activities of the people are increasingly differentiated'. At the same time, specific professional 'estates' (Stände) emerge that specialise in particular activities. This is the case in law, too: further development and application of law are transferred to such a professional estate, to learned lawyers (2002, p. 67). This is Savigny's famous Spezialistendogma,

Regardless of the controversy between Savigny and Thibaut, Thibaut prevailed on Savigny's paradigm of forms since it was deemed to be a polarized and antithetical version of Savigny's original ideas to allow for the discussion of a permanent form of regulating society, not as a codified project but as a non-lasting pretorian and historicized vision Savigny developed in his systems[578].

A concise explanation of *chthonic* tradition embraces the natural flow of knowledge as sedimentation of a multilayered process building up from an oral tradition in which the system prioritizes informal dispute resolution and opts for a way of life resembling the ones existing in Europe prior to significant changes brought about by revolutionary moments[579]. One relevant aspect of those societies concerns the blurry nature of bodies of law, which:

> "*If the private law of obligations was unnecessary, it was and remains otherwise for the law of crime. Yet in a communal society lacking formal institutions there is little place for individual responsibility or institutional control. So crime becomes the responsibility of civil society, in the form of the groups, clans or families which make it up. Injury to a member was an injury to the group. In the absence of formal courts (in most instances), reparation was by negotiation between groups, and by means either of payment or equivalent punishment. Absent negotiated agreement, there remained the blood feud, a powerful incentive to agreement.*[580]"

This passage condenses the sources of how a system evolves from solving core situations that disrupt social peace. As previously demonstrated, the function of the *pacta di non petendo*[581] exercised the task of triggering a reaction that would later evolve to the overture

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which was to greatly influence later conceptions of modern law, for instance Max Weber's understanding of the general developmental tendency of law (Schröder 1976)."

578 Schiavone, Aldo. *Alle Origini del Diritto Borghese: Hegel contro Savigny*. Laterza, 1984. p. 39. See also Glenn, H. Patrick. "Are legal traditions incommensurable." *Am. J. Comp. L.*, vol. 49, 2001, p. 133 and also Small, Albion W. "Some Contributions to the History of Sociology. Section II. The Thibaut-Savigny Controversy: Continuity as a Phase of Human Experience." *American Journal of Sociology*, vol. 28, no. 6, 1923, pp. 711-734.

579 Glenn, H. Patrick. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford University Press, 2000. p. 60.

580 Glenn, H. Patrick. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford University Press, 2000. p. 64.

581 See Peterlongo, Maria Emilia. *La Transazione nel Diritto Romano*. Dott. Giuffrè editore, 1936-XIV. p. 186: "*Questa era, dunque, la configurazione di una transazione conchiusa mediante patto, che, pertanto, non dava azione ma generava eccezione: nuda pactio obligationem non parit, sed parit exceptionem (D. 2, 14, 7, 4). Eccezione, che aveva un'efficacia processuale negativa in quanto si poteva far valere solo negando il diritto accampato dall'attore, dimostrando che questo aveva cessato di esistere. Infatti, una transazione convenuta*

for the exceptions or defenses, the ritualistic forms provided by Roman formulas eased by defenses[582]. A change in legal organization that played a crucial role in shaping the concept of autonomy in the new liberal world. It provided a more suited framework for individuals to exercise their freedom to enter transactions. It aimed to establish a comprehensive and coherent legal system based on rationality, secularism, and individualism[583]. These principles resonated with the ideals of autonomy and personal freedom composing the liberal world.

As codified legal systems spread throughout Europe, they began to emphasize the importance of individual autonomy in contractual relationships, often invoking Roman authority with a disclaimer. Pothier, together with Domat[584], largely influenced the Napoleonic codification drafting[585]. Yet, the ideas symbolizing the achievement of a codification, somehow praising the Roman effort, diverged from the Roman law interpreters' definition of a contract, a formal agreement with a specific legal name or cause. Instead, he proposes that the definition of a contract constitutes a mutual agreement in which one or both parties pledge to provide

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mediante semplice patto lasciava adito al risorgere della controversia, ma occorreva però, che una delle parti avesse esperito effettivamente azione in contraddizione alla convezione conchiusa perché si potesse mettere in funzione l'exceptio. In un solo caso la transazione convenuta per semplice patto portava l'estinzione ipso iure del rapporto se cui si transigeva, cioè in tema di delitti, dei quali diremo trattando dell'oggetto della transazione. Il patto di transazione portava, dunque, una difesa negativa e forniva una persecuzione imperfetta del proprio diritto come qualunque mezzo indiretto."

582 Glenn, H. Patrick. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford University Press, 2000. pp. 126-127.

583 **Those values were absorbed with a blending of the canonical methods of assembling knowledge from the former order with enlightened elements that emerged from the revolution.** See Merryman, John Henry, and Pérez- Perdomo, Rogelio. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. Stanford University Press, 2007. pp. 29-31.

584 Domat. *Le leggi civili nel lor ordine naturale opera del celebre Domat*, Tomo primo. Zatta, 1802. p. 90 : « La seconda è di quelle leggi che si chiamansi diritto privato, che comprende le leggi che regolano fra particolari le convenzioni, i contratti di ogni naturam le tutele, le prescrizioni, le ipoteche, le sucessioni, i testamenti, ed altre simili materie. Queste leggi che regolano queste materia fra particolari, e le liti che possono nascerne, sembra che dalla maggior parte siano intese per il diritto civile. » p. 190 : « Questa parola concencione è un nome generale che comprende ogni sorte di contratti, trattati, e patti do ogni natura. »

585 Halperin, Jean-Louis. *L'Impossible Code Civil*. Presses Universitaires de France, 1992, p. 121: "*S'il est impossible de savoir si Cambacérès utilisa tel ou tel ouvrage, le texte du projet présenté en août 1793 permet d'identifier certaines influences. Les emprunts fait à Pothier sont sans doute les plus nombreux et les plus significatifs. Les textes de Pothier sont parfois repris mot pout mot, par exemple sur la possession, l'accession ou l'établissement des servitudes par la destination du père de famille. Presque toutes les dispositions du projet Cambacérès sur la théorie générale des obligations et sur les contrats spéciaux sont puisées dans les traités de Pothier*. »

something to the other or commit to taking or abstaining from a specific action[586]. Through the twist on Roman sources, Pothier was completing a process started by the natural school.

The French Civil Code, for instance, enshrined the principle of "freedom of contract"[587], allowing parties to determine the content and conditions of their agreements according to their preferences as long as their agreements did not contravene public policy or mandatory legal provisions. This focus on individual autonomy was seen as essential to the functioning of the free market and the preservation of individual liberty. Codification also disseminated liberal values by providing a more accessible and transparent legal system. In turn, the accelerated increase of transactions facilitated by the legal framework promoted the expansion of commercial transactions and encouraged economic development. By simplifying and organizing what once was the privileged arena restricted to the legal profession, codification encroached on a language that binds the judge and the citizen, allowing individuals to understand the rules governing their relationships and engage in transactions with greater confidence and predictability, fostering the growth of market-based transactions.

Some open-textured principles permitted the exercise of the discretionary space reserved for those who deeply understood the system's function and could employ a language that, although it contained the margins of subjective incursions, appeared to conform to the text. The idea was that through *bonnes moeurs*, the penetration of justice and public utility would exercise control over parties' autonomy, a purpose overhauled by the French 2016's

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[586] Pothier, Joseph-Robert. *Ouvres Choisies de Pothier, Tome Premier, Traité des obligations*. Lebrige Frères, 1832. p. 7: "De là suit que dans notre droit, on ne doit point définir le contrat comme le définissent les interprètes du droit romain, *Conventio nomem habens à jure civili, vel causam*; mais qu'on le doit définir, une Convention par laquelle les deux parties réciproquement, ou seulement l'une des deux promettent et s'engagent envers l'autre à lui donner quelque chose, ou faire ou à ne pas faire quelque chose." See also Montalin, Moreau de. *Analisi delle Pandete di Pothier*, translated by Angelo Lanzellotti. Giuseppe Antonelli, 1883. patti, p. 663.

[587] Article 1102.

Ordonnance. And even if it is still limited to the French jurisdiction, it warned jurisdictions that replicated the French model that the former order eroded[588].

Parties were obliged to know the rules, assuming the responsibility for not conforming to the objective order they submitted by forming the social contract to that given jurisdiction. However, those assumptions needed constant revision to fulfill the ends of the juridical system, among them the idea of justice. The conception that a rational, objective basis for the juridical order gained steam, presupposing that the participation of individuals in a free market made them aware of the operative rules of this legal order. The maxim *ignorantia legis non scusat* was revived from Roman Law and became paramount to individuals' obedience to the newly established order. Without that fiction, it could not be stated that both parties were entering the same agreement, and courts would be prevented from enforcing agreements in courts.[589]

Without the assumption that parties learned the Law and were aware of its consequences, none of the institutes that confirmed transactional existence could exist. Evidence of consideration is only valuable if parties' knowledge of the legal operations they are activating is present. The maxim is associated with the Roman concepts of "*voluntas*," "*bona fides*,"[590] and "*aequitas*," which permit the parties involved to have a restricted dialogue

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[588] See Guarneri, Attilio. "La scomparsa delle bonnes moeurs dal diritto contrattuale francese." *La Nuova giurisprudenza civile commentata*, vol. 33, no. 3, 2017, pp. 404-414. And also Terlizzi, Giulia, et al. “Erosione e scomparsa della clausola dei’buoni costumi’come limite all’autonomia contrattuale.” *Persona e Mercato*, 2018.

[589] Sharing this same line of thought, one finds the illuminating passage Bolgár, Vera. “The Present Function of the Maxim Ignorantia Iuris Neminem Excusat- A Comparative Study.” *Iowa L. Rev.*, vol. 52, 1966, p. 626 were she outlined the history of the maxim: "*The cardinal issue in the history of Roman Law, indeed of all Law, is the development of the notions voluntas, bona fides, and aequitas. These are sophisticated notions and their very emergence involves conscious combination of social and legal elements: the agreement of a community that its attitude towards individual freedom as well as its standards of honesty and justice should be governed uniformly by the rules of Law. Even their appearance presupposes a more advanced and complicated way of life, with the corresponding expansion and loosening of legal procedure, which, in a more primitive society, restricts individual action within the rigors of strict form. Hence, the necessity of the individual's knowledge of the laws and the attendant freedom of choice between such legal rules as would bring about the expected results of their transactions, do not appear until a later stage in Roman Law."*

[590] Schulz, Fritz. *Principles of Roman law*. Clarendon Press, 1936. p. 223-224: “*Fides was defined in ancient times as adherence to the word, keeping one’s word, fit quod dicitur. Though this one of the well-known playful etymological definitions, and though the connotations of the word are by no means exhausted thereby, it gives*

about the terms of their transaction. Beyond that limit, an open door would be left to discuss the entirety of a contract, which went against public police. Eliminating the barriers that prevented the judicial rediscussion of contractual terms would imply returning to the seal as the formal means to validate a transaction and that technology needed to be updated considering the volume of transactions and the impossibility of discussing every transaction based either on formality or fairness. The last two principles are conflicting principles that mutually interact to allow the balance between speed-certainty on the one hand and trust-reliability on the other. There are narrow defenses for ignorance within the jurisdictional geographical limits where a transaction is documented.

As the system evolved, those limits became looser, allowing for defenses such as *lésion*, theories of mistake, and others comprising discussion on the transactional terms. In that regard, the state was confronted with, on the one hand, ensuring the adjudication of disputes through the monopoly of violence and granting individuals the nascent subjective rights justifying the social contract commitment. The modern state was built under the idea not of a heavenly divine ruler but of one who maintains the functioning of the social Raison d'être. Governments realized that differences were not mitigated through contractual freedom since existing prejudices among parties were carried to transactions in a lottery of winners and losers from the new liberal enterprise. Those biases and lack of information were transferred to the legal discourse. Consequently, the next stage was for the state to regulate disparities uniformly, observing material differences.

Ascarelli, in his writing on Antigone and Porzia, alluded to the *deus ex machina* from the Merchant of Venice, in which an interpretative artifice is deployed to free Antonio from

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its essential meaning. Fides – to be rendered in the following by 'fidelity'— means to be bound by one's word. The Romans boast of their fidelity and proudly contrast 'Roman fidelity' with 'Punic' and 'Greek fidelity'. To be faithful is one of their standard principles of life. Naturally they too were at times guilty of breaking faith, but the existence of their maxim is a little disturbed thereby as the existence of a legal rule by its breach. In very truth they strive after fidelity; faithlessness is in their eyes a social blot. Fidelity is only one aspect of constantia which is to the Roman's a man's central virtue: 'take a course and stick to it."

the extraction of his stripe of flesh[591]. Those interpretative twists give space for the state's functioning as the *ex machina* of the juridical order[592]. As the codification movement progressed in Europe, it brought a new approach to understanding the Law and its application to individual cases. This development led to a more granular law approach, which focused on tailoring legal rules and principles to the specific circumstances and needs of the individuals involved in a dispute.

However, a term that promises to contrast modern codification is encapsulated in the term "*granular legal norms*,"[593] which represents a legal schema characterized by its extraordinary precision and detail in crafting legal norms, mimicking algorithmic programming. It aspires to codify rights, obligations, and prohibitions comprehensively. The ethos underlying granular law is the conviction that a legal system's effectiveness and predictability are directly contingent on the exactness and scope of its statutes. By systematically dissecting legal tenets into their smallest possible units, granular legal norms aim to curtail ambiguity and promote lucidity, thus engendering an environment of legal predictability and, ideally, enhanced fairness. The resulting complexity and voluminous nature

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591 Ascarelli, Tullio. "Antigone and Portia." *The Italian Law Journal*, 2016, p. 762.

592 Calasso, Francesco. *Gli Ordinamenti Giuridici del Rinascimento Medievale*, 2nd ed. Giuffrè, 1949. p. 31: "*Quest'ultima muove ovviamente dal principio dela così detta statualità del diritto, teoria che vede cioè nello Stato il deus ex machina dela vita del diritto, e tutto il diritto riconduce allo Stato: risalente ala esaltazione hegeliana dello Stato come 'realtà dell'idea etica', come 'spirito ético, in quanto voluntà manifesta, evidente a se staessa, sostanciale, che si pensa e si conosce, e si compie ciò che as e in quanto lo sa*." For a perspective fast forward into the to the future of blockchain but recurring to the *ex machina* theatrical device se Werbach, Kevin; Cornell, Nicolas. "Contracts ex machina." *Duke LJ*, vol. 67, 2017, pp. 313-354: "*The ability to bind oneself in this way-to assume an obligation voluntarily-is itself a form of freedom*."

593 See the pioneering Busch, Christoph; De Franceschi, Alberto. "Granular legal norms: Big data and the personalization of private law." *Research Handbook in Data Science and Law*. Edward Elgar Publishing, 2018. p. 408-424: "Personalized law abandons the equal application of general standards to all individuals. One may therefore ask, if this approach is compatible with the fundamental principle of equality. In a polemic manner, one could argue that personalization and granularization is only technical jargon for new forms of discrimination. In particular, there is a certain danger that old forms of "hard" discriminations that have been outlawed on the basis of constitutional law, return through the backdoor disguised as psychologically and scientifically founded regulation." Against, arguing for the presence of a state of exception based on algorithmic apparatus, see McQuillan, Dan. "Algorithmic states of exception." *European Journal of Cultural Studies*, vol. 18, no. 4-5, 2015, pp. 564-576. p. 570: "While a state of exception is not a dictatorship, it is a space devoid of law where legal determinations are deactivated, especially that between public and private."

of such intricate laws could inadvertently diminish their accessibility, making the legal system more intimidating for those it seeks to govern.

The codification advantage sought general principles and broad-based rules to be universally applied, eschewing exhaustive detail in favor of the broader application. The Napoleonic era reflected a desire for universality and uniformity in the law's application, a cornerstone of the adopted approach to codification[594].

One of the driving forces behind this granular law approach was the recognition that a one-size-fits-all solution may not always be appropriate or just when addressing complex and diverse legal issues. As societies became more complex and interconnected, it became increasingly important for legal systems to account for each case's unique characteristics and contexts[595]. This emphasis on individualization and specificity led to the development of legal doctrines, principles, and mechanisms that aimed to provide greater flexibility and responsiveness in addressing the parties' needs in a dispute.

One such mechanism is the doctrine of equity, which emerged as a way to address the potential injustices that could arise from the strict application of codified legal rules[596]. Equity allows courts to exercise discretion in applying legal rules, taking into account a case's specific facts and circumstances to achieve a more just outcome. This equitable approach helps ensure that legal principles are applied in a way that is sensitive to the unique needs and contexts of individuals involved in a dispute, thereby promoting a more personalized and granular application of the Law.

Another example of the granular law approach can be seen in the development of legal doctrines that focus on the individual intent and understanding of the parties involved in a

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[594] Gordley, James. "Myths of the French Civil Code." *The American Journal of Comparative Law*, vol. 42, no. 3, 1994, pp. 459-505.

[595] Marmor, Andrei. *Interpretation and Legal Theory*. Clarendon Press, 1992. pp. 49-51.

[596] MacQueen, Hector L. "Private Law's Revolutionaries: Authors, Codifiers and Merchants?" *Revolution and evolution in private law*, edited by Sarah Worthington, Sarah, Andrew Robertson, Andrew, and Graham Virgo. Hart Publishing, 2018, pp. 31-49.

contractual relationship. This emphasis on subjective intent, as discussed earlier in relation to the will theory in contract law, reflects a broader trend toward tailoring legal rules and principles to the specific circumstances and understandings of the individuals involved.

The granular law approach has also been evident in the rise of specialized legal fields, such as family law, labor law, and consumer protection law, which seek to address the unique needs and vulnerabilities of specific groups or relationships within society. These specialized areas of Law have contributed to developing legal rules and principles that are more attuned to the specific contexts and concerns of the individuals involved, fostering a more personalized and granular application of the Law.

Much of the difficulty faced by the jurists' crafting codification, or at least organizing legal thought in taxonomies that could be standardized [597], relied on the need to adjust the fictitious legal scenario to the events occurring in real time. While confronted with hard cases or cases sensitive to equity issues, the provisions assuming will theory as conforming to parties' behavior contradicted the expected consequence for the disputed case. The codification movement as an attempt to impersonalize Law under the disguise of the reasonable man[598], the one predictable and prompt for calculating the risks of enterprises assumed, was first displaced by the Law and Economics equations on risk allocation, aspiring to reduce justice concerns under the risk-allocation orientation. However, as the present unveils, juristic metaphysics and economic calculation are superseded by a superior normative framework that, by eradicating the ideal, assumes the immanence of values juristic cognitive intelligence would not be able to calculate, creating a model of particular oracular justice.

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[597] Ashley, pp. 7.

[598] Deleuze, Gilles. *Da Cristo Alla Borghesia e altri scritti*, 2010, pp. 91-92: "Affinché possa stabilirsi una mediazione tra la vita privata e lo Stato, è inoltre necessario che nessuno possa dire: lo Stato sono io. Lo Stato rimarrà senza dubbio il soggetto, ma il soggetto impersonale. La situazione della borghesia prima del 1789 era paradossale: aveva la vita privata, aveva la mediazione della vita privata e dello Stato, ma lo Sato non c'era. Lo Stato era un soggetto impersonale: e per costituirlo c'è voluta la rivoluzione. Ma questa costituzione non fondava la possibilità di un'altra mediazione? Quella del denaro. L'avere dome denaro, mai come proprietà."

To provide a provisory conclusion to the following topic, the codification movement in Europe paved the way for a granular law approach, which claims to emphasize the importance of tailoring legal rules and principles to the specific circumstances and needs of the individuals involved in a dispute. This more personalized and responsive approach to the Law has contributed to the development of legal doctrines, principles, and mechanisms that promote greater flexibility, fairness, and justice in the application of legal rules.

II.IV. Tracing the Origins of Exceptions in Public Law: Insights from Schmitt and Agamben

The exploration of immemorial periods in the Western tradition sheds new light on the roots of legal exceptions. By substantiating the origins of these exceptions, one can be exposed to a multitude of historical documents for justifying a legal suspension due to necessity. Every scholar who pursues the task of providing evidence on the origins of the exception is confronted with the most ancient documents in which a suspension of the Law is justified on the basis of necessity. As it will be demonstrated, necessity also constitutes a core value for the dismantling of will theories in contract law, for the same reasons it performs disruptions in the public boundaries. Horwitz captured this effect with irreplaceable precision while dealing with Justice Holmes's vision of anomalies[599]:

> *"The process of generalization and abstraction in the late-nineteenth-century law was identified with the goal of rendering private law more scientific and less political. It also had the effect of freeing legal rules from the reality testing that regular encounters with the concrete particularities of social life might entail."*

[599] Horwitz, Morton J. *The Transformation of American Law 1870-1960: The crisis of legal Orthodoxy*. Oxford University Press, 1992. p. 15.

While abstraction renders the system impersonal[600], enabling not only physical persons to participate in it but also juridical entities to perform in the juridical realm as autonomously as individuals, it detaches the identity the Law provides to natural persons. This effect resonates with the fiction that the social contract is constituted by nullifying each individual's importance in the political body's tissue[601]. When the sovereign declares that, for specified reasons, it will suspend the protection granted to its constituents by invoking emergency powers and the like, the sovereign is using abstraction to suppress entitlements such as liberties and freedoms with the justification that the fiction justifies cutting on real flesh. By the same token, the abstractions allowing private wills to prevail assumed an abstraction as more relevant than the mental processes manifesting the wills and promises undertaken.

The state of exception in Private Law suppresses the exact mechanisms that permitted the cores of Private Law to be elevated in a separate field in the first place[602]. Under stress, the system annihilates the exercise of free will it granted to receive individuals' support. It deploys private adjudication to emulate the precepts of justice. It erases dissent by canceling the power exercised by legislation and normative framing[603].

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600 Nicoletti, Michelle. *Trascendenza e Potere: la teologia politica di Carl Schmitt*. Editrice Morcelliana S.p.A, 1990. p. 52-53: "Nel manifestarsi della frattura tra concreto e astratto, tra fattualità e idea, nell'insuperabilità della crisi e della discontinuità l'unico ponte che può garantire un rapporto di mediazione che solo permette di illuminare di senso i lati dell'abisso, altrimenti condannati a un'insensata solitudine, è una decisione. Nell'impossibilità di un passaggio graduale dall'una all'altra sponda, la mediazione della decisione diventa l'unica possibile."

601 Santner, Eric L., et al. *The weight of all flesh: On the subject-matter of political economy*. Berkeley Tanner Lectures, 2016. p. 38: "As we shall see, the story concerns historical dislocations and displacements in the sites, procedures, and fantasies in and through which social bonds are formed in the flesh of embodied subjects, flesh that at a certain moment in our history comes to be weighed in balances that ever more determine our individual and collective destinies."

602 Solari, Gioele. *Individualismo e Diritto Privato*. Giappichelli, 1959. p. 333: "Le finzioni a cui i giusnaturalisti ricorsero furono le soluzioni illogiche di in problema logicamente insolubile." The present chapter is permeated with Solari's most valuable contributions, and the work will be cited thoroughly.

603 A work conducting a groundbreaking reconstruction of the journey of exiled European legal scholars and their intellectual exchanges with their American counterparts following the total seizure of power from the Nazi regime is found in Tuori, Kaius. "Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe." *Cambridge Studies in European Law and Policy*. Cambridge University Press, 2020, pp. 221-262. p. 235: "*The way in which Coing and others focused on European legal history and its reinterpretation may thus be seen almost as a constitutional project without a constitution. Through the construction or the discovery of a tradition of principles, rights and legal dogma, German legal scholars emphasized the long tradition through which the law had developed. Tradition and history were in a sense überpositiv, beyond and above positive law. Since there was no real concept of an original contract on rights (as supposed by the*

Many scholars have mentioned the perils of extrapolating the limits conferred to the sovereign power to invoke its mandate to replace the order disrupted by unexpected events. Others, along with Franz Neumann[604] and David Abraham[605], reconstructed what events led to the emergence of an authoritarian state that, once in operation, silenced dissent implacably. Their evidence exposes a much more convoluted legal framework in which, without expedited collaboration from the corporate side, the exception would not assume the contours and overreaching effect it did[606].

The technologies activated to strengthen the regime were devised by juridical expertise, twisting the abstract models to conform with the novel substantiation of the state. Those

French or Anglo-Saxon tradition), the tradition took its place in the equation." The work illuminates the significant influence these scholars exerted on the formation of quintessential American legal concepts, such as the rule of law, and their role in embedding Roman notions of freedom and property within the legal culture.

[604] Neumann, Franz L. "The Change in the Function of Law in Modern Society." *The rule of law under siege: selected essays of Franz L. Neumann and Otto Kirchheimer*, edited by William E. Scheuerman et al. University of California Press, 1996, pp. 111-141. p. 111: "If Kant's legal theory is examined apart from his ethics, it is found that natural law has completely disappeared from it. The state is viewed as an organization that is to guarantee that individuals can be free without interfering with the freedom of their fellow men. But the decision is delivered not by the autonomous individual but by the absolute state, which is the logical postulate derived from the state of nature under which, in turn, the existence of provisional private property and of the rule of pacta sunt servanda are already asserted as a dogma. According to Kant, the freedom of the legal subject is guaranteed solely by the requirement that the state must rule only on the basis of general laws. But this postulate is asserted with rigorous consistency. Kant even rejects the softening of the strict legal system, as it is codified by (statutory) general laws, through the law of equity."

[605] The author has made an incisive and indelible contribution by illuminating the perils posed by overarching governmental policies toward capitalist enterprise. The intellectual richness of his insights and the dialogues generated around the theme have substantially enriched and invigorated the present research. See Abraham, David. *The Collapse of the Weimar Republic: political economy and crisis*. Princeton University Press, 1981. p. 327: "Instead, through the mobilization for war, Nazi autonomy increased. Again, the lack of a general class interest beyond their private and fractional interests prevented German capitalist from opposing this. Industrialists were reduced to competing for state orders, but they could tolerate such a situation because the initiation of warfare, the fractions of industries were individualized; intracapitalistic competition was systematically encouraged. In general, the daily interests of individual entrepreneurs were restricted less than was the New Deal, while at the same time the Nazis were considerably more independent of the social economic elite than was Roosevelt. The extent of state control over the economy helped deprive German capitalists of their ability to resist Nazi proposals."

[606] Neumann, Franz. *Behemoth: The structure and practice of National Socialism, 1933-1944*. Octagon Books, 1972. p.10: "By entrusting decisive administrative tasks to these private bodies, the pluralists hoped to accomplish two things: to bridge the gap between the state and the individual and give reality to the democratic identity between the ruler and the ruled. And, by placing administrative tasks in the hands of competent organizations, to achieve maximum efficiency." And it is the following reasoning the one worth craving in stone for the future, p. 11: "However, since the fact is that society is antagonistic, the pluralist doctrine will break down sooner or later. Either one group will arrogate the sovereign power to itself, or, if the various groups paralyze and neutralize one another, the state bureaucracy will become all-powerful-more so than ever before because it will require far stronger coercive devices against strong social groups than it previously needed to control isolated, unorganized individuals."

apparatuses constitute contractual stipulations[607], fictional theories of assent, suppression to question the balance of exchange[608], elimination of clauses allowing the discussion of subjective states of mind, and regulation addressed to a fraction of the participants of juridical regulations. It also encompasses the interpretation of necessity favoring the selected cast, coinciding with those holding financial prestige and that previously captured political power. The effects are the blindsided legal production of theories benefiting the winners of the equation, the gradual disappearance of Private Law theories protecting the disadvantaged, and preferably switching the adjudicatory power outside public accountability.

Whereas the most benefited in the market of Private Law rules enjoy access to the court system, alternative dispute resolution, and private adjudication in general, the vast majority are left with public contractual policy as if they did not deserve equal treatment before the Law. The politics of retrenchment comprises providing an excessive normative framework without denying substantive rights but emptying the content on procedural grounds[609], making it so that parties are unaware of the operative mechanisms denying manipulating private law rules. One landmark example in the already mentioned High Trees case evidences the importance of enforcing and creating private Law theories in which modest sums are submitted before judicial evaluation[610].

Without the guided jurisprudential gaze over the poverty of those incapable of paying rent in the aftermath of WWII, the doctrine of estoppel would not have evolved in the same

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[607] Macaulay, Stewart. "Private Legislation and the Duty to Read--Business Run by IBM Machine, the Law of Contracts and Credit Cards." *Vand. L. Rev.*, vol. 19, 1965, p. 1051.

[608] For a doctrine highlighting the importance of those theories see Gordley, James. "Equality in exchange." *Calif. L. Rev.*, vol. 69, 1981, p. 1587 and Dalton, Clare. "An essay in the deconstruction of contract doctrine." *Yale Lj*, vol. 94, 1984, p. 997.

[609] Staszak, Sarah L. *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*. Oxford University Press, 2015. p. 38.

[610] Knapp, Charles L. "Rescuing Reliance: The Perils of Promissory Estoppel." *Hastings LJ*, vol. 49, 1997, p. 1191.

way[611], and public policy targeting distributional effects have minimal impact without the promotion of theories crafted by the courts.

When that phase of implementing the exception is already achieved, the presence of a state of exception in Public Law becomes imperceptible. Nevertheless, before exploring the uncharted territory of Private Law and exception, it is worth launching the incursion in the well-situated location of necessity in public affairs.

One influential study, conducted by Théodore Reinach, commences its examination of the state of siege with references to Cicero's De Legibus, stressing the demand for an alternate societal framework in the face of public threats:

> "*Les mesures d'exception sont, dans le droit public, l'équivalent des actes de légitime défense dans le droit privé ; elles dérivant d'un principe antérieur et supérieur à tout législation positive, que le bon sens populaire a exprimé dans ces formules énergiques : 'Aux grans maux il faut de grands remèdes.'- Salus Populi suprema lex esto*.'"[612]

Cicero justifies the passage by invoking the application of the maxim for the general welfare of the people when rulers are confronted with war or dissensions and cannot conduct their office's duty as established by previous Law:

> "*Iuris disceptator, qui privata iudicet udicariue iubeat, praetor esto: is iuris ciuilis custos esto; huic potestate pari quotceumque senatus creuerit populusue iusserit, tot sunto. Regio imperio duo sunto, iique praeeundo, iudicando, consulendo praetores, iudices, consules appellamino: militiae summum ius habento, nemini parento: ollis salus populi suprema lex esto*."[613]

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[611] Gan, Orit. "Promissory Estoppel: A Call for a More Inclusive Contract Law." *J. Gender Race & Just.*, vol. 16, 2013, p. 47.

[612] Reinach, Théodore. *L'état de siège : étude historique et juridique*. Librairie Cotillon, 1885. p. 7.

[613] Cicero, Marcus Tullius. *De legibus libri*. Vahlen, 1883. p. 167-168, excerpts III,3 7-8, 8-9, free translation: "Let there be a legal arbitrator, who judges private matters or orders them to be judged; let him be the praetor: let him be the guardian of civil Law. To him, with equal power, let there be as many as the senate or the people have approved or ordered. Let there be two with royal authority, and let them be called praetors, judges, or consuls by leading, judging, and advising: let them have the highest authority in military affairs, let them obey no one: let the safety of the people be their supreme Law."

Similar faculties were attributed to the ruler in the Greek states to mitigate the effects of the state suspension of the Law. In that regard, the institute that most resembled the Roman dictatorship was the l'æsymnétie, "æsymnète" (or "*aesymnetes*" in its more common Latinized form), from the ancient Greek word "αἰσυμνήτης" (aisymnētēs). It refers to an elected or appointed official in ancient Greek city-states who was given extraordinary powers to restore order during times of crisis or political instability.

The investiture of almost absolute powers was a practice disseminated among numerous cultures since every society must answer the question if Law knows necessity or whether it is just the lack of regulation that causes the wreckage of the normal function of powers. To confirm this assertion it is valuable referring back to Reinach:

> *"De l'æsymnétie dans les Républiques grecques. – On trouve chez divers peuples de l'antiquité, Hébreux, Carthaginois, Gaulois, des magistrats extraordinaires élus dans certaines circonstances particulièrement graves et investis de pouvoirs presque absolus ; mais nulle part ailleurs qu'à Rome il ne semble que ces magistratures aient pris le caractère d'une institution régulière. L'institution qui se rapproche le plus la dictature romaine est l'æsymnétie de certaines républiques grecques."*[614]

This topic constitutes the twist that authoritarian regimes produce since they take place with similar dynamics as the repercussions of the disintegration of a given order affect boundaries that ignore the public-private divide. Even before complete erosion and dissolution of state's social structure, the political realm activates practices incorporated in the Law to function as normality is the rule, when in reality is a manifestation of the erosion of core values requiring continuous states of emergency to pretend Law's knowledge of necessity.

One defining aspect of contemporary exceptional states, as opposed to their dictatorial counterparts, lies in their stealthy deployment of liberal rhetoric to obscure underlying authoritarian tendencies. These states, nestled behind the bulwarks of contractual and entrepreneurial freedoms, exploit the grammar of private law while perpetuating grave

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[614] Reinach. *L'état de siège: étude historique et juridique*. Librairie Cotillon, 1885. p. 11.

violations of established legal norms[615]. They maintain an ostensible adherence to the rule of law and the existing legislative framework, concealing their departure from constitutional principles.

Private contracts often serve as a disguise, obfuscating how private law can be manipulated to exacerbate existing disparities[616]. In this context, rather than safeguarding historically recognized fundamental protections, the legal system morphs into a cosmetic instrument, primarily benefiting those equipped to exercise their autonomy[617].

Originally conceived as an emblem of freedom, the contract deviates from its foundational intent, emerging as an instrument of imbalance[618]. The state's role, particularly evident in the aftermath of WWII, in adjudicating unexpected hardships, has been considerably marginalized, resulting in the ascendance of an authoritarian force extrinsic to the state *apparatus*[619]. At first glance this statement contradicts the claims brought forward by David Abraham and Franz Neumann, on the excessive pervasiveness of the state control of economic activity as the cause for the Weimar collapse, but the relevant aspect between those conflicting arguments is to observe where and how the state will exercise its interventive role.

In contrast to their autocratic counterparts, one distinguishing feature of today's exceptional states is their utilization of liberal discourse, which rejects self-identification as authoritarian. These states are fortified by the pillars of freedom to contract, enterprise, and engage in reciprocal relations. They employ the syntax of Private Law to carry out serious

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615 Agamben, Giorgio. *State of Exception*. University of Chicago Press, 2005. p. 15.

616 Kennedy, David. "The Critique of Rights in Critical Legal Studies." *Left Legalism/Left Critique*, edited by Brown and Halley. Duke University Press, 2002. p. 178-202.

617 Teubner, Gunther. "Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?" *Transnational Governance and Constitutionalism*, edited by Joerges, C., Sand, I., Teubner, G. Hart Publishing, 2004. p. 3-28.

618 Cohen, Jean L. *Globalization and sovereignty: Rethinking legality, legitimacy, and constitutionalism*. Cambridge University Press, 2012. p. 80.

619 How bilateral investment treaties subvert private and international legal orders, see Pauwelyn, Joost. "At the Edge of Chaos? Foreign Investment Law and Economic Development." *European Journal of International Law*, vol. 25, no. 1, 2014, pp. 241-270. See also Dezalay, Yves; Garth, Bryant G. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1996. p. 31.

infringements of the fundamental principles of law. Whereas the authoritarian state tears up the constitutional text to assume the contours of a retrenchment of fundamental freedoms, the current model makes use of an entire performance that is conducive to the belief that the liberal state, currently neoliberal, is interested in maintaining the rule of law and conformity with the existing legislative apparatus.

Contracts entered by private parties serve as a shield for protecting the ends of a few handfuls of players who united with the state power to dismantle the Private law edifice of fictitious freedom. In that regard, the state of exception will not resemble the blatant Nazi-fascist regimes that deployed the Private law structure to achieve its ends. Nor will they engage in an effusive legislative production to justify and legitimize those ends.

The project of converting Private Law into an exception was engendered by assuming Kantian subject/object dichotomies to collapse opposed universes in one reality[620], where subjects were finally incorporated into the market, commodified[621], and merchandized. From that point, impaired from enjoying the status of being free to exercise small-scale interactions, individuals were left apart from Private Law's reconfiguration, excluded as subjects of contractual negotiations, and ignored in public or private adjudication. In being so, all the advancement produced in the aftermath of war and catastrophic events requiring the presence of financially meager causes with high equity values were discarded as not part of the

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[620] MacIntyre, Alasdair. "The privatization of good: An inaugural lecture." *The Review of Politics*, vol. 52, no. 3, 1990, pp. 344-361.

[621] On the idea of a market domain see Radin, Margaret Jane. *Contested Commodities*. Harvard University Press, 1996. p. 35: "Compartmentalization – separation of market real from a non-market realm – must be clear on what things belong on which side of the subject/object divide. Only the object side is suitable for commodification. Yet it seems the subject side, at least as traditionally conceived, might readily collapse. The Kantian conception of personhood makes us all interchangeable and thus engenders liberal political equality: equal treatment of persons as ends, not means; equality before the law; one person, one vote; and the rule of law. By postulating such a world of fungible, subjective, autonomous units, however, Kantian personhood also facilitates conceiving of concrete personal attributes as commodified objects.[…] The difficulties caused by Kantian personhood become clear from a brief examination of Hegel's views on property and contract. For both Kant and Hegel, private property is necessary to realize or actualize the will of a person in order to achieve freedom. Contract is also necessary in order to be free and well-developed selves; we must be able to alienate external things, and we must not be able to alienate internal things." Neumann, Franz. *Behemoth: the structure and practice of national socialism, 1933-1944*. Octagon Books, 1972. pp. 446-449.

discussion. If, according to the paramount of liberal theory, an individual must enjoy private property for the exercise of freedom of contract, the individuals depleted from that minimal will not enjoy the freedoms or justice values achievable through that.

As Agamben emphasizes while commenting on previous authors on the state of exception, the problematization of this state occurred at the Constitutional level, allowing him to claim that a state of exception occurred as a constitutional dictatorship[622], first with constitutions that contemplated broad provisions on measures activated in the situation of emergency.

In contrast, in the second stage, the dictator granted himself unlimited powers to the ruler that first invoked this stage. As Article 48 of the Weimar constitutional provision allowed, the expansion of the executive powers converted the balance of powers into a void guarantee. Through parliamentary delegations and the gradual erosion of executive power accountability, the technique of recasting the exception as a rule is condensed in one of Benjamin's most influential works. Benjamin's VIII thesis on the concept of history encapsulated the following idea:

> "*The tradition of the oppressed teaches us that the 'state of emergenc' in which we live is not the exception but the rule. We must attain to a conception of history that accords with this insight. Then we will clearly see that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against fascism. One reason fascism has a chance is that, in the name of progress, its opponents treat it as a historical norm. -The current amazement that the things we are experiencing are 'still' possible in the twentieth century is not philosophical. This amazement is not the beginning of knowledge -unless it is the knowledge that the view of history which gives rise to it is untenable.*"[623]

The first violation that the state of emergency institutes and then spreads to different arenas of social life is the idea that necessity will require addressing issues differently from how they have been addressed before. Above all, the mandate legislators received no longer fulfills the real or imaginary threats the regime requires to promote peace. With this discourse,

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622 Agamben, *Homo sacer*, p. 171.
623 Walter, Benjamin, et al. *Walter Benjamin: Selected Writings: Volume 4, 1938–1940*. 2003, p. 392.

bewilderment between arbitrariness and normativity enters the political space since the juridical process by which those spheres kept distance disappears. That process is embedded under the adage "*Necessity knows no Law*" since power must disobey its normativity to provide public welfare.[624]

The activation of the Executive apparatus occurs in twofold. Part consists of activating governmental powers to make the administration of abnormal affairs function before the exceptionality. The other is replicating the system's collapsing on the multiple ongoing private relations. Landmark cases applying exceptional commandments and government interference in private Law occurred in times of disturbance when parties did not expect, foresaw, or predict the risks assumed before signing an agreement. It also coincides with scholarship production attempting to adjust the theoretical framework with the unfolding riddles that dismantle previous juridical assumptions. That aspect was noted in the forward provided by Tracy B. Strong in the English translation of Schmitt's Political Theology:

> *"It is thus not only the case that 'exceptions' are obvious, as they would be if we think of them as when produced by severe economic or political disturbance. It could appear natural to read what Schmitt says in Germany back through the years of hyperinflation or the economic depression of 1929."*

While explaining Schmitt, he concluded that:

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[624] Harel, Alon. *Why law matters*. OUP Oxford, 2014, p. 115: "In his discussion of law in the Summa Theologiae, Aquinas addresses cases of emergency in which 'the observance of [a] law would be hurtful to the general welfare' and says that in such cases the law 'should not be observed'. He argues that if: the perils be so sudden as not to allow of the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law.What does it mean that 'necessity knows no law', and how does this claim justify acting contrary to law in cases of necessity? Aquinas's dictum can be interpreted in two ways: an instrumental (pragmatic) way and a principled way. Under the first, the law is simply not rich enough to capture the complexity and diversity of circumstances, whilst consequentialist reasoning requires admitting exceptions to the law. As Aquinas says: 'All law is ordered to the common well-being of men and gains the force of law precisely from this fact. To the degree that it fails in accomplishing this end, it loses its binding force. Also Agamben, Giorgio. "Homo Sacer II, 1: State of exception." *The Omnibus Homo Sacer*. p. 171: "Between 1934 and 1948, in the face of the collapse of Europe's democracies, the theory of the state of exception (which had made a first, isolated appearance in 1921 with Smichtt's book Dictatorship) saw a moment of particular fortune, but it is significant that this occurred in the pseudomorphic form of a debate over so-called constitutional dicatorship".

"Decisions and judgments would always be necessary. In this Schmitt can be thought to be an initiator (albeit not recognized or known as such) of contemporary developments such as Critical Legal Studies on the Left and the Law and Economics movement on the Right."[625]

For the object of this topic, one of the most relevant analogies of exception and the powers it contains to alter reality are found in Schmitt's comparison of exception to miracles: "*The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries*."[626]

The impact of war and emergencies on contractual relationships is a critical area of legal inquiry that unearths the intersection between sovereign responses and private agreements[627]. In the face of unforeseen circumstances[628], traditional legal frameworks often struggle to provide comprehensive solutions, revealing the inherent limitations of positivistic legal theories. A more realistic understanding of the Law's capacity to anticipate all facets of social life shows necessary[629].

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625 Schmitt, Carl, *Political Theology: Four chapters on the concept of sovereignty*, translated by George Schwab [1922, 2nd ed. 1934]. The University of Chicago Press, 2005. xii.

626 Schmitt, Carl, *Political Theology: Four chapters on the concept of sovereignty*, translated by George Schwab [1922, 2nd ed. 1934]. The University of Chicago Press, 2005. p. 36: "*All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries*."

627 As a reference to the application of the jus singulare in cases of war, it is fundamental to examine the writings of Cogliolo, Pietro. "Legislazione di Guerra nel Diritto Civile e Commerciale con una parte speciale sopra la colpa, i danni, la forza maggiore." *Raccolta completa di tutti i decreti-legge in rapporto al Diritto Privato*, 2nd ed. Unione Tipografico-Editrice Torinese, 1917. p. 95: "Nessuno ha mai dubitato che il diritto romano rappresenta anche dal punto di vista dell'intrinseco ordinamento giuridico un'opera secolare che fu d'insegnamento ai popoli che vennero poi, e che merita di esserlo ancora. Quel diritto aveva creato non per lavorio mentale dei giuristi, ma come effetto storico dell'evoluzione giuridica la distinzione tra *jus commune* e *jus singulare*, dei quali diritti, malgrado le molte dispute che si fanno in dottrina per precisarne i concetti, può darsi questa idea fondamentale, che il diritto comune è quello che contiene una norma generale, mentre il diritto singolare è quello che contiene una norma generale, mentre il diritto singolare è quello che, pur regolando un numero grande di casi, contiene una norma che è una eccezione di fronte alla prima."

628 Scott, James C. *Seeing like a state: how certain schemes to improve the human condition have failed*. Yale University Press, 1998. p. 97: "In the cases of war and depression, the rush toward an administered society has an aspect of force majeure to it".

629 Friedrich, Carl J.; Brzezinski, Zbigniew. *Totalitarian Dictatorship and Autocracy*. Harvard University Press, 1965. pp. 57-58: "How to cope with the constant emergency created by the totalitarians has therefore become one of the most serious problems of all constitutional and democratic regimes".

Recent global events have highlighted enterprises' challenges in adapting to unpredictable circumstances. The covid-19 pandemic and various armed conflicts worldwide have significantly impacted private contracts, revealing the human incapacity to account for every possible scenario in drafting contractual provisions. As it happens when the state convulses and has its existence jeopardized, also private agreements, being the social fabric of society, endures the consequences of uncertainty and necessity once they imbalance power relations[630]. As a result, fulfilling contractual obligations has become increasingly difficult, exhorting the need for alternative legal approaches.

One potential avenue for addressing these challenges is the doctrine of *force majeure*, which allows for the suspension or termination of contractual obligations when unforeseen events beyond the control of the contracting parties render performance impossible or unduly burdensome[631]. Another mechanism is the rebus sic stantibus principle allowing for the renegotiation or termination of contracts when a fundamental change of circumstances renders performance unreasonably burdensome or unjust[632].

The legal effects of war and emergencies on contracts necessitate a departure from positivistic legal theories and a more realistic assessment of the Law's ability to address unforeseen contingencies. The assumption is that sovereign confrontation with an emergency can only be mitigated by activating the mechanisms disregarding previous commandments. As a dual-track policy, those mechanisms would inevitably spread into the private sphere, and when the turmoil is normalized, they will be incorporated into regular provisions.

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[630] MacNeil, Ian R. *The New Social Contract: an inquiry into modern contractual relations*. Yale University Press, p. 1: "Contract without the common needs and tastes created only by society is inconceivable; contract between totally isolated, utility-maximizing individuals is not contract, but war; contract without social structure and stability is -quite literally - rationally unthinkable, just as man outside society is rationally unthinkable. The fundamental root, the base, of contract is society."

[631] Berger, Klaus Peter; Behn, Daniel. “Force majeure and hardship in the age of corona: a historical and comparative study.” *McGill J. Disp. Resol.*, vol. 6, 2019, p. 76.

[632] Pauwelyn, Joost. "At the Edge of Chaos? Foreign Investment Law and Economic Development." *European Journal of International Law*, vol. 25, no. 1, 2014, pp. 241-270.

Therefore, positivistic explanations of the juridical are defeated by a more realistic portrait of juridical incapacity to predict all aspects of social life, the reason why the left and the right resuscitate Schmitt to uncover Hobbesian thought as the only possible explanation for the unexpected. Normativism applies when there is an assumption that the juridical realm can address all the events occurring in the phenomenical world. Adjudicatory and legislative dialogue promotes progress when the system conforms to its framework.

In that process, either the legislative grants a broader mandate for the judiciary to create new rules to accommodate novel and unforeseen events, or it will suspend the Law to confer the Executive this power. The last situation, in return, will likely lead to disruption and legislative inability to follow the pace of change. That process of incapacity to render solutions to the unforeseen becomes even more evident when one turns to contractual terms. Time and expectations to perform the agreement are not met with the factual developments that alter the previous stipulations. The equation is altered, and one party feels entitled to discuss their incapacity to predict those unexpected alterations in the contractual balance. Even though a breach of contractual terms results in damages or specific perfomance, parties are not willing to endure the burden when an event could equally affect both just depending on each side they were unfortunate to be at the event.

Numerous landmark cases discuss unfairness that requires equitable solutions outside previous juridical decisions so both parties distribute the burden of the unforeseen event. As benchmarks arose during this period, relevant treatment on the issues is found in Transatlantic Financing Corp. v. United States[633], and Central London Property Trust Ltd v. High Trees

[633] 363 F.2d 312 (D.C. Cir. 1966) 312 (D.C. Cir. 1966). In which the court held that the closure of the Suez Canal did not render performance of a shipping contract impossible since there was an alternate route. See also Holtzmuller, Paul E. Contracts-Impossibility-Inaccessibility of Usual and Customary Route-Transatlantic Financing Corp. v. United States, 363 F. 2d 312 (DC Cir. 1966). William & Mary Law Review, 1967, 8.4: 679.

House Ltd[634], to mention a few representative historical decisions that influenced the treatment of exceptional circumstances.

It is argued that sovereign powers may have to disregard previous commandments in the face of an emergency. This assertion finds support in Agamben's analysis of the modern allocation of the exception, where he notes the link between presidential power and a state of war. In light of recent global events, it is clear that enterprises cannot foresee all possible scenarios, and the limitations of private agreements are evident.

The perspective presented challenges the notion that Law can predict all aspects of social life. Instead, the focus is on the mechanisms that can be activated to mitigate the impact of an emergency, even if this means disregarding established rules. This view is consistent with the notion that Law is not an end but a means of ensuring social order and promoting the public good. As such, the juridical must be responsive to changing circumstances and prioritize the common good, called welfare, in Cicero's already mentioned maxim. The analysis well-rehearsed from Agamben's work, specifically his insights on allocating the exception in modern times, highlights the links between emergency powers, war, and presidential power, leaving aside the strict separation that allows for the exception in public Law and constitutional documents.

This reasoning must include the paradigms offered by disturbance following the Great Depression and the New Deal, assuming that the exception also derives from practices outside strictly public governmental affairs. Since the public order results from bourgeoise construction, it lacks a reason to exclude the conduction of the private as guided by the permanence of the exception. This analysis is particularly relevant in recent global events, as it underscores the limitations of private agreements and the need for a more nuanced approach

[634] [1947] KB 130 (CHESHIRE, G. C.; FIFOOT, C. H. S. Central London Property Trust Ltd v. (High Trees House Ltd. LQ Rev., 1947, 63: 283.

to the juridical. By acknowledging the possibility of emergencies and the need to respond quickly and effectively, the juridical can be better equipped to address future challenges.

Most enterprises cannot adjust to the future because the future is unpredictable. Just considering the last two major global events that happened in the last five years and its implication on private agreements, the limitations for the human condition to inserting all possible clauses that enable the fulfillment of all agreements became evident. In that sense, an analogy is drawn between "*necessity knows no Law*" as much so as "*necessity knows no contract*."

As Agamben's enlightened insights situate the modern allocation of the exception in the interlude of the great wars, the connection grows in evidence:

> *"Because the sovereign power of the president is essentially grounded in the emergency linked to a state of war, over the course of the twentieth century the metaphor of war becomes an integral part of the presidential political vocabulary whenever decisions considered to be of vital importance are being imposed. Thus, in 1933, Franklin D. Roosevelt was able to assume extraordinary powers to cope with the Great Depression by presenting his actions as those of a commander during military campaign."*[635]

II.V. Enforcing Formless Agreements and the Rising Significance of Exceptions in Legal Discourse

"[...] *All contracts are, by necessity, incomplete to some degree*."[636]

The sounding assertion holds truth today as much as it did in the beginnings of the Law. One might think that the adequate way to fill the gaps in contract formation relies on the language of the Law since even when parties cannot exercise autonomy for the absence of predicting outcomes, they can still obey law commands on the issues regulated by legislative

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635 Agamben, Giorgio. "Homo Sacer II, 1: State of exceptio." *The Omnibus Homo Sacer*, p. 183.

636 Barnett, Randy E. "The sound of silence: default rules and contractual consent." *Virginia Law Review*, 1992, pp. 821-911.

and case law. However, principles of agreement or bargain will apply depending on the legal tradition in which a controversy is embedded[637].

Esmein, in his *Études sur les contrats dans le très-ancien Droit Français*[638], addresses the first topic on the "formation and proof of contracts" with the maxim "*convenances vainquent loy*,"[639] that in Old French translates to "agreements prevail over the law." This legal maxim highlights the importance of the principle of freedom of contract, which allows parties to enter into agreements on their terms and conditions, even if those terms deviate from the general rules established by the law.

The evolution of the Law takes divergent paths on the same fundamental ideas, such as the hierarchy of private agreements over the written laws and the perfection of an agreement to become binding and enforceable before the courts. To demonstrate how those ideas permeated the mind of later legal thought, Esmein introduced passages of statuses produced in the Middle Ages that contained the seeds for further developments of now indisputable juridical realities. Among them, "*le denier à Dieu*"[640], *denarius dei*, was a coin that one of the

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[637] See Von Mehren, Arthur. "The French Civil Code and Contract: A Comparative Analysis of Formation and Form." *La. L. Rev.*, vol. 15, p. 687. In footnote he clarifies a relevant aspect of article 1347 of the French Civil Code in its original version, according to which the requirement of a written instrument is softened by the possibility of replacing that exigence with a proof of future satisfaction of those requirements. "*art. 1341 requires a written instrument either executed in the presence of a notary or signed by the parties. Articles 1347 and 1348 introduce certain exceptions to this formal requirement, the most important of which is the provision that a so-called beginning of written proof will satisfy the formal requirement of article 1341*." In a recent case decided by the French Court of Cassation, the subject on proof of a written document was presented before the court, (Cour de cassation (French Court of Cassation), March 1, 2023, Pourvoi No. 21-25.497). The decision dealt with the validity and evidentiary value of a private deed (in French Law designated *acte sous seing privé*) in relation to proving a debt in a case involving a limited liability company and a real estate investment company. The Court reasoned in the sense that a private deed, once recognized or legally considered recognized by the parties involved, has the same evidentiary value as an authenticated deed (*acte authentique*). The Court indicated that with few specific exceptions provided by law, a private deed only requires the signatures of the parties who are obligating themselves. However, given specificities irrelevant for the present argument, the Court maintained the appellate court decision, refuting the evidentiary value of a private deed. The recent case confirms that the complexities originated by the gap between what the law provides and the realities animating parties still persist regardless of the technological and evidentiary evolution in the Law. The letter of the Code may have changed, but the dilemmas to which jurists are confronted remains.

[638] Paris: L. Larose et Forcel, 1883.

[639] p. 5.

[640] Esmein, 1883, p. 24.

contracting parties gave to the other as a sign of a concluded deal, referring to a coin used in ancient times to signify the conclusion of a contract or an agreement between two parties.

Furthermore, even though proof of a contract and valid defenses to exit a formed contract will take divergent paths on the compilation of legal ideas, the aspect condensed in this formula constitutes a relevant start. Drawing a parallel between *denarius dei and* the common law consideration is inevitable as Esmein refers to Blackstone and the influence he received from this medieval legal production[641].

Even if it becomes repetitive to restate the story of assumpsit for nonfeasance to connect the problem of the birth of enforceable agreements before the courts, the detour is necessary since the formation of a law of contract and not of contracts, as Buckland McNair alludes, is a compulsory passage to bridge the Roman Law and the Common Law[642].

The attempts at unifying theories have been unsuccessful because a universal theory of enforcing contracts has yet to be created. Addressing the treatment of "legal transaction" or "juridical act"(*negozio giuridico*)[643], Paulo Cappellini presented a general theory of all

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641 Berman, Harold J.; Reid Jr, Charles J. "The transformation of English legal science: from Hale to Blackstone." *Emory LJ*, vol. 45, 1996, p. 437.

642 Note on Simpson in the previous chapter. See Simpson, A. W. *A History of the Common Law of Contract: the rise of the Action of Assumpsit*. Clarendon Press, 1975. pp. 248-249: "Eventually the exception became dominant, so that it began to seem more comprehensible to reverse the rule and to say that assumpsit did lie for nonfeasance, and to explain the situations in which the action did not lie as exceptions to this new general principle." See also Jackson, R. M. "The Scope of the Term Contract." *LQ Rev.*, vol. 53, 1937, p. 525. The author provides the best synthesis of all theories surrounding the terms covenant, contract, and agreement. He stressed the lack of etymological consistency between the expression and the meanings it have received over time. The key moments of contractual understanding consist in St. German Doctor and Student, and the turn of contract not restricted through debt and assumpsit. As a closing remark the citation of Confucius analects were precise for the arguments developed in that brilliant article. In Confucius apud Jackson p. 536: "'Now, if names of things are not properly defined, words will not correspond to facts. When words do not correspond to facts, it is impossible to perfect anything. Where it is impossible to perfect anything, the arts and institutions of civilization cannot flourish. When the arts and institutions of civilization cannot flourish, law and justice do not attain their ends; and when law and justice do not attain their ends, the people will be at a loss to know what to do.'"

643 Ihering, Rudolph V. *L'esprit du Droit Romain: diverses phases de son développement*, translated by O. De Meulenaere, tome IV. A. Marescq, 1880. p. 1-7: "*S'il était vrai, comme on l'enseigne, que la mission de la jurisprudence consiste dans l'interprétation des lois, nous nous serions déjà assez longuement étendus sur la jurisprudence ancienne pour avoir épuisé la matière. Nous connaissons maintenant cette branche de l'activité juridique. […] Le droit romain doit donc sa formation, dès l'origine, au calcul et à l'intention. L'art juridique est aussi ancien que le droit romain lui-même. Mais entre sa première apparition et son époque florissante, il y a dans ses degrés comme dans son mode de formation et un grand espace de temps, et un progrès immense* ».

agreements under the category of "*juridical act*" as a flawed attempt to merge the diversity of relations comprised under the category, exposing the unfeasibility of merging patrimonial dealings, gratuitous, unilateral, personal, mandatory or transferral among others under the umbrella of a concept. That attempt constituted an epistemological obstacle for him since those categories evolved over time. In contrast, the "juridical act" theory[644], as elucidated by Calasso, consisted of a leap of abstract understanding viable in a novel moment of the juridical science, with Savigny, the Pandecist school, and the like[645].

According to Cappellini, a monolithic concept withstands the multi-centennial contribution to the parallel ideas that the juridical produced, making it impossible to apply a magical juridical formula that amalgamates all concepts under a single idea. What he suggests, instead, is not a "demystification," disenchanting the legal realm, but that of precisely historicizing it, for just in a second passage allowing for its abstraction. As he masterfully stated, unifying multiple meanings and situations under one name results in the impossibility of reasoning upon an institution that congregates disparate meanings.

The process that was undertaken to bypass rituals and release parties from strict rituals received a variety of names and actions for the conclusion of an agreement required the creation of an abstraction in which the parties conforming with those fictions performed what the real act required.

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644 As a pinnacle of German construction, see Zweigert, Konrad; Kötz, Hein. *An Introduction to Comparative Law*, 2nd revised edition, translated from German by Tony Weir. Clarendon Press, 1994. pp. 152-153: "The idea of 'legal act' is also far too abstract notion. For the German scholar, 'legal act includes not only the normal type of contract such as sale or lease and also the so-called 'real contract' namely that special agreement needed in German Law to transfer a real right or create a real right over another's property, but it also includes the contract at family law, such as the contract of adoption or the agreement made by the bride and bridegroom before the registrar at the marriage ceremony, and even includes the making of a will, the giving of notice to terminate or to rescind a contract, as well as, for example, the resolution to increase a company's capital made by a formal meeting of its shareholders. Although legal declarations of such diverse sources and significance fall within the concept of 'legal act', the BGB enacts rules about voidability on the grounds of error, deceit, or duress, about agency, conditions, and so on, which it solemnly asserts to be applicable to all legal acts of whatever type. This extreme position has proved an inexhaustible source of controversy about the range if application of these general rules."

645 Cappellini, Paolo. *Digesto delle Discipline Privatistiche: sezione civile, XII*. UTET, pp. 98-99.

Regarding the continental tradition embodied in France, another solution expressed in the provision of original article 1347 exposes a divergent path of addressing the enforceability of incomplete agreements.

The clash between requiring consideration for the perfection of an agreement deals with the difficulties of assessing when a promise becomes irreversible and, therefore, legally binding. On the other hand, the requirements of elements that must be presented to produce an enforceable promise consist of the technique chosen by continental legal traditions. **In that regard, the continuous changing of the provisions establishing when a promise is legally binding in codified traditions demonstrated how the terrain is sludgy.**

All the issues gravitate around two conflicting principles, one of the worth of one's word and the other as *Fides* in the meaning of the heavenly Roman deity that all need to conform[646].

As accounted by Holdsworth in his multivolume History of England's magnanimous effort, the same concerns that afflicted the Roman jurist perpetuated for the later English

[646] Grosso, Giuseppe. *Il sistema romani dei contratti*. Giappichelli, 1950. pp. 187-200: "Classico è il principio che *nuda pactio obligationem non parit sed parit exceptionem*, principio che deve essersi direttamente affermato nello sviluppo dei pacta. Anzitutto va rilevato che nelle fonti appare un significato più ristretto ed uno più ampio di *pactum*. Il termine *pactum,* come il verbo più antico pacere e il più moderno pacisci, recava insito il concetto del fare la pace, onde il concetto tecnico di un accordo diretto a sciogliere un vincolo fra le parti, ad eliminare una pretesa de uni verso l'altro. È il significato del ni cu meo pacit delle XII Tavole in rapporto al membrum ruptum, per evitare il taglione, del pacere relativo al ladro (onde il principio che le azioni di iniuria e di furtum si tolgono di mezzo col semplice pactum); è soprattuto il significato del pacta conventa servabo dell'editto pretorio, con cui si accordava l'exceptio pacti conventi. Ma nell'uso comune il termine pactum o pactio assunse il significato più generale di convenzione, venne ad indicare l'accordo non formale (cfr. la definizione in D. 2, 14, 1, 2; D. 10, 12, 3 pr.); in questo significato più generale fu assorbito lo specifico pactum conventum tutelato in generale dal pretore, che viene chiamato col termine più specifico di pactum de non petendo.[…] A livellare gli spigoli e le oscillazioni sembra intervenire il nuovo principio, exceptio pacti inest bonae fidei iudiciis, che, conforme alle nuove concezioni, viene inteso in senso sostanziale (così che si parla indifferentemente di inerenza di patti al giudizio o al contratto), principio a cui viene ricondotta l'efficacia del contrarius consensus re adhuc integra." See also Radin, Max. "The Roman law of quasi-contract." *Virginia law review*, 1937, pp. 241-258. p. 250: "That is where the matter was left by the Roman Law. And that is where it might well have been left permanently. The Institutes, to do that book justice, declared that the *summa divisio*, the first classification of actions or of obligations, is into two classes, civil and praetorian, roughly corresponding to actions at Common Law and in Equity. For Anglo-American Law this at one time made a vast difference, since at Common Law the prayer for relief was precise and specific while at Equity the prayer was for whatever relief the petitioner was entitled to. At Roman Law, however, the latter was the prayer in all *bonae fidei iudicia*, which included most of the civil actions, except those based on stipulation, *mutuum, legatum* and a few others. Even in these, equitable defenses (exceptions) could be pleaded."

jurisprudence, as many rituals were used to affirm the validity of an agreement. Reiterating Holmes inquiries, he asserted:

> *"We are told by the modern jurist that the essence of a contract is the agreement of wills embodied in mutual promises directed towards some one object; as, as Holmes has said, 'to explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense. But to say that agreements and promises have existed in a remote antiquity is one thing; to say that such agreements were enforceable at law - were contracts - is quite another. The power and capacity of early law is taxed to the full by the task of protecting life, limb and property. The task of enforcing promises involves problems beyond its capacity, and coercive authority beyond its strenght. And so we find that there is practically no doctrine od contract in Anglo-Saxon law. It is 'but an insignificant appurtenance to the law of proprety."*[647]

Furthermore, again relying on Holdsworth, this difficulty, still reckoned by modern legal systems, allowed the ecclesiastical courts to assume an overreaching power over private affairs until the common law developed an advanced system of actions abandoning the rigid writs:

> *"We can see but dimly the elements which will go to the making of some of the later legal ideas upon the subject of agreements and topics related thereto. We see very clearly the real element which will colour the actions of debt and detinue. We see, if not in Anlgo-Saxon law, at least in contemporary foreign law, the writing which will become the great formal contract of the common law. We see in the God's penny and the Earnest, conceptions which mercantile custom will add to the common law. We see in the wide jurisdiction assumed by the church the germs of that conception of* læsio fides *which will, in later days, make the ecclesiastical courts formidable rivals to the royal courts. Other formal ceremonies with agreements, or, if so connected, they will survive only un popular usage. The small influence of the Roman conceptions of contract in English law will ling preserve many of the older ideas in the common law, when they have been almost wholly lost in continental systems of law."*[648]

In the following chapter approaching the reception of exceptions on substantive and procedural grounds, the disarticulation of the juridical attempt to convert a variety of diverse situations under the quest for a unified juridical act will become visible as an engine malfunction manifests itself in situations of distress.

Calasso immortalized this process in fine words: "*Che, d'altra parte, nella spirale del razionalismo puro il contratto non dovesse tardare ad apparire come species di un genus più*

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[647] Holdsworth, W. S. *A History of English Law*, Vol. II. Methuen & CO., 1909. p. 72-73.
[648] Holdsworth, W. S. *A History of English Law*, Vol. II. Methuen & CO., 1909. p. 75.

vasto e più alto, dove la volontà umana potesse essere contemplata in vitro, astraendo cioè dalle sue concrete forme d'attuazione, era altrettanto fatale."[649]

The abstraction produced the possibility to experiment *in vitro* situations and facilitated the drafting of laws and the rules by which parties and judges would obey[650]. Nevertheless, at the same time, it created the void object of the present study. Cleared the dubious situation in which contractual intent is amalgamated with contractual forms and perfomance. In the following chapter, the juridical categories created to compartmentalize various situations regarding unfulfilled promises will be addressed.

II.VI. Navigating Uncertainty: The Erosion of the Concept in Contracts amidst a Landscape of Exceptions

The state of exception in private Law is grounded in two primary justifications. The first, to which diffuse attention will be dedicated, is traced back to the origins of *exceptio* in Roman Law regarding literature not explored yet. It ventures on Fernand de Visscher's article "*Pactes et Religio*," where he examines the legal and cultural implications of the "*exceptio*" in Roman Law— extracting from the Romanic sources the sacred nature of this institution as a challenge presented before the praetor[651]. From that early analysis, it becomes possible to pinpoint its development and subsequent transmission to modern private law systems.

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649 Calasso, Francesco. *Il negozio giuridico: lezione di Storia Del Diritto Italiano*, 2nd ed. A. Giuffrè, 1959. p. 340.

650 Herman, Skael. "The uses and abuses of Roman law texts." *The American Journal of Comparative Law*, vol. 29, no. 4, 1981, pp. 671-690. See also Riccobono, Salvatore. *Corso di Diritto Romano: Stipulationes. Contractus. Pacta. Anno Accademico 1934-1935*. Dott. A. Giuffrè editore, 1935- XIII, p. 318: "La falsificazione si vede dall'ordine, dove la *stipulatio* è relegata anche dopo il *pignus*. Invece, il primo posto doveva essere assegnato nel testo alle figure di *ius civile*; *nexum*, *mancipatio*, etc. Ma con ciò si rende manifesto il motivo che ebbero i Compilatori di omettere anche qui i tipi caduti in desuetudine e di collocare al posto di essi, come al solito, *emptio*, *locatio* etc." Riccobono, Salvatore; Nathan, Edward. "Outlines of the evolution of Roman Law." *University of Pennsylvania Law Review and American Law Register*, vol. 74, no. 1, 1925, pp. 1-19.

651 Visscher, Fernand. "Pactes et Religio." *Archives de Droit Privé: revue juridique trimestrielle*, extrait du vol. XVI, 1953, pp. 139-150. p. 149 : « D'ailleurs, devant la puissante réalité psychologique et sociale que constituait la religio dans la vie antique, on concevrait difficilement qu'à aucune époque la juridiction du magistrat ait été ouverte sans obstacle à celui qui en violait les préceptes. Peut-être la place qu'occupe

Drawing upon a range of legal and historical sources, Visscher expresses the relationship between "*exceptio*" and the cultural context of "*religio*" in ancient life, illustrating how religious beliefs and values significantly influenced the evolution of legal principles. Even though he starts deploying the negative concept of the problem, he moves forward with the positive function of a pact before it gains a more contractual aspect related to *conventio*, purposely reclaiming the need for detachment before reentering the contractual realm[652].

According to Visscher, the *pacte* originated from the operation German scholarship defined as "*Bargeschäft*," used to describe a particular type of legal transaction in Roman Law, as deriving from the German words "Bar" (meaning "cash" or "in kind") and "Geschäft" (implying "transaction" or "deal"). Initially, the *pacte* dealt with private peace obtained between victim and perpetrator, and considerable literature replicated this allusion as the origins of peace in a society in which public punishment was restricted to crimes defying the imperial order. Preceding Visscher's writing, Maria Emilia Peterlongo dedicated a book to the subject, where in her findings, the *pactum di non petendo* also exercised a negative function that Visscher alludes to.

However, another component of the pacte hinted at its positive function, constituting an idea of friendship completed as *foedus* or *sponsio,* that happened in an international context among the different contending tribes. Nonetheless, the celebration of peace treaties in the international arena when transferred to the private realm never achieved the positive level one

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l'exceptio dans l'Edit du préteur, en tête de la liste des exceptions, pourrait-elle être considérée comme un indice de sa haute antiquité. Il paraît très vraisemblable qu'avant l'introduction de la procédure formulaire, le préteur déniait l'action à celui qui y avait renoncé par un pacte, suivant en cela d'ailleurs l'orientation donnée par les XII Tables. Il est assurément intéressant de retrouver ici, à la base du systême romain des pactes, le reflet d'une des positions fondamentales adoptées par l'humanité ancienne vis-à-vis des puissances de l'au-delà. L'une des ces positions est caractérisée par un corps de préceptes négatifs, d'interdictions visant des agissements considérés comme capables d'entraîner des réactions funestes de la part des puissances surnaturelles. Souvent inspirée par des croyances d'ordre magique, cette position, qui est peut-être celle de l'humanité primitive, repose aussi dans une large mesure sur las plus authentique *pietas* envers les dieux et envers les morts.»

652 Visscher, *Et c'est l'originalité profonde de la notion de pacte, par opposition à celle de contrat, que je voudrais ici brièvement dégager*", p. 139

might have expected, for the reasons Visscher masterfully recalled and for its undeniable importance must be transcribed:

> *"En somme, dans cette fonction, la fides se manifeste non comme une régle d'action, mais comme une défense, un empêchement de commettre certains actes. Au stade que rèvèle le vieux systême des pactes, elle ne commande pas, elle interdit seulement. Et est c'est ici qu'apparait le point de contract entre le systême des pactes et l'une desconceptions les plus importantes et les plus révélatrices de la mentalitè romaine: je veux parler de la religio. Il va sans dire che ce terme doit être pris dans son sens antique, et qu'il nois faut faire ici totalement abstraction de la notion moderne de religion."*

Because religion in the meaning attributed to Visscher in the Early Roman Republic was an absolute interdiction, *religio* prohibited acts against *fides once they* occurred as amical peace. Visscher, therefore, found evidence of the presence of perfect harmony between pretorian institutions and moral conceptions.

The "*exceptio*," contained in the Corpus Iuris Civilis and the Digest, embodies the principle of preventing unjust enrichment and maintaining balance in legal disputes as the interpolated sources indicated. However, as Schulz suggested in one chapter dedicated to the theme *Fides*, the nuanced nature interpreted as originated from Roman sources is nothing but an interpolated attribution to meaning that the Roman Law in their times did not achieve[653].

This concept was rooted in the formulary procedure and was closely related to the Twelve Tables. It guided the praetor when denying an action to those who had renounced it through a pact. Visscher suggested that the position of "*exceptio*" at the head of the list of exceptions in the Praetor's Edict may have indicated its high antiquity. Indeed, the Digest contains several passages that mention the "*exceptio*," such as D. 2.14.7, D. 12.1.40, and D. 44.4.4.

Ancient societies adopted various stances concerning supernatural powers, often influencing their legal systems. Taboos, absolute interdictions, and mystical ways of validating

[653] Schulz, *Principles of Roman Law*, p. 226-227.

truths were the object of great concern about conducting ancient incantation rituals. As James George Frazer pointed out, revealing the magic virtue of divine names was the cause for putting persons to death, as happened to Valerius Soranos[654].

Conducts were attentively observed to avoid damnations since formulas and religious rituals were indistinct. In this scenario, the concept of "exceptio", informed by negative precepts and prohibitions, aimed to prevent actions that could provoke disastrous consequences from supernatural forces. Supernatural beliefs pervaded individual's lives, and as Schmitt would later claim, modern concepts are secularized ideas of political theology concealed by the Philosophy of the Enlightenment. That is why positivistic jurisprudence ignored the exception since the attempt was to create a system that extracted authority from within.

The avoidance of arbitrariness at all costs came with the risk of sacrificing the actual meanings that lifted the once-stable structures of the Law. As synthesized by Peter Goodrich in "The Public Theology of Private Law": "Private Law depends just as much as public law upon the explicit supremacy of the maxim, *salus populi suprema lex esto* being established as early as the Twelve Tables of Roman Law and continuing unabated through the early modern stages of common law, fondly retailed by Hobbes and as prevalent today in invocations of executive powers, appeals to national security and in invocations of executive powers, appeals to national security and in public policy arguments that generally suffuse both the public and the private spheres. Justice, which has always exceeded law, is historically a matter of both faith and of mystery. For Agamben, this is spelled out in the form of the liturgy, and in our context the trial, as a mode of effectivity, of faith being made operative and accomplishing it says This goes back to the earliest law, to the *legis actio* being defined by Gaius as *sacramentum*, as the sacralization of the word, and specifically as the word, the human bond, being made active and substantive."

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[654] Frazer, James George. *Taboo and the perils of the soul*. Macmillan and Company, 1913. p. 391.

The circle traced to evoke those origins found in Goodrich's epitome of this blending in the image of an iPhone or a Blackberry transiting between the bedroom and outdoors. Technology did what *religio* attempted before, to create an environment where acts performed effects in all spheres, at times to serve the authorities and others the parties. The public-private construction subverted that path since it blocked the justifications of divine attributes, as much as Schmitt uses the hint of miracles to explain the exception. In this regard, the Law is a replica of precepts of justice, but the contrary does not correspond. For that reason, the *exceptio* will always find its way to be raised, ignoring the nature of laws presented or what compartment of the legal arena they are confined.

This connection between Law and supernatural beliefs is well-documented in Roman sources, including the works of jurists such as Gaius, Ulpian, and Paulus. As the Roman legal system evolved, the "exceptio" was adapted and refined, eventually being transmitted to later legal systems through the writings of influential scholars like Justinian and the glossators. The influence of Roman Law on modern private Law is evident in the incorporation of the "exceptio" into present-day defenses, such as estoppel, which prevent a party from asserting a claim or right that contradicts their previous actions or statements.

The principles behind the "exceptio" have been preserved and transported to modern legal systems through the work of jurists and scholars who built upon Roman legal concepts. For example, the medieval glossators and commentators, such as Accursius and Bartolus[655],

[655] Gordley, James. *The philosophical origins of modern contract doctrine*. Clarendon Press, 1991. p. 49 : « As we shall see, in all likelihood Bartolus and Baldus formulated the doctrine with this distinction in mind. Nevertheless, they were not attempting to explain Roman law systematically by Aristotelian principles. They merely found Aristotle helpful in interpreting their Roman texts. One key text stated: 'When there is no causa, it is accepted that no obligation can be constituted by an agreement; therefore a naked agreement does not give rise to an action although it does give rise to a defence (*exceptio*). » See also Maniscalco, Lorenzo. *Equity in Early Modern Legal Scholarship*. Brill-Nijhoff, 2020. p. 31: "Bartolus essentially thought that proceedings *ex aequitate* would involve avoiding *apices iuris*, that is, rules *qui veritatem negotii non tangent*, which Donahue, understands to mean 'procedural requirements that did not go to the truth of the matter'. Baldus similarly argued that '*in curia mercatorum dicitur quod negocia debent decidi de bona aequitate, omisiss solennitatibus iuris*'. As explained by Baldus this does not mean that such courts are allowed to disregard civil rules altogether. Instead, they can avoid the procedural niceties which do not touch directly on the matter at hand. The practical application of these principles is not always straightforward. For instance, Baldus and Bartolus

studied and expanded upon the Roman sources, facilitating the development of legal doctrines that continue to shape contemporary private Law.

In modern legal systems, the "*exceptio*" manifests as defenses like estoppel, which ensure fairness by preventing litigants from benefiting from deceitful or contradictory behavior. This persistence of the "*exceptio*" in contemporary jurisprudence reveals the lasting impact of Roman Law on our understanding of justice and equity, demonstrating how ancient principles continue to inform legal thought and practice today.

In Roman Law, exceptio served as a defense before the praetor, embodying the principle of preventing unjust enrichment and maintaining balance in legal disputes[656]. It was closely related to the Twelve Tables and the cultural context of religio, which highlights the importance of honoring divine will and societal expectations.

This connection between religio, fides, and exceptio demonstrates the significant influence of religious beliefs and values on Roman Law, shaping the development and application of legal principles such as *exceptio*[657].

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add that an exception nudi pacti cannot be opposed to another party in a court merchant because in this case 'ius commune non intromittit se de detrahendo iurigentium, sed non adiicit et robur'. This seems to suggest that the reason a pactum nudum will, be upheld by a court proceeding is nothing in the *ius commune* specifically meant to take away its biding power under *jus gentium*."

656 Manenti, Carlo. *Contributo critico alla teoria generale dei pacta secondo il diritto romano*. Enrico Torrini Editore, 1891. pp. 25-27: "Tuttavia andò sempre più accreditandosi fino ad assumere nell'opinione dell'universale carattere di assioma, quel falso modo di concepire il *pactum* dell'editto pretorio, inaugurato, come abbiamo visto, dalla glossa. E così si credette, del pari universalmente, che il diritto romano non avesse voluto mai accordare pieno riconoscimento alle semplici convenzioni dei privati, salvo alcuni pochi casi tassativamente contemplati dal diritto civile (contratto consensuali), e dal diritto pretorio (*pacta pretoria*) e dal diritto dell'epoca imperiale (*pacta legitima*). Che cioè esso avesse voluto riconoscere soltanto a metà la forza obbligatoria dei pacta nuda, per amore o per necessaria conseguenza di quel rigoroso formalismo, che, come benissimo osserva lo Ihering, è tra le caratteristiche dell'antico diritto romano, quella che più vivamente colpisce l'attenzione anche la più superficiale. Ed in realtà, mano mano cresceva l'influenza del diritto canonico e si andava con ciò esagerando e fraintendendo il momento etico del diritto, quel preteso sacrificio della forza obbligatoria delle convenzioni (*pacta nuda*) al principio della forma, fatto dal diritto pagano, venne a trovarsi in contradizione col sentimento morale del tempo. Allora più che mai dovette apparir fondata quell'accusa contro il formalismo che troviamo stupendamente formulata da Ihering." (Manenti) p. 28: "Quest'illusione che aveva portato il diritto canonico sino al punto di dare forza obbligatoria a tutte le promesse giurate, si trovò poi in perfetta armonia col concetto esagerato, in parte anzi falso addirittura, della libertà soggettiva individuale, e conseguentemente della responsabilità dell'individuo per tutto ciò che fosse mero effetto di una sua determinazione volontaria. Si credette che la funzione, il che nel trovare tutti i mezzi per assicurare entro i limiti del lecito e dell'onesto, la costante e più completa attuazione della volontà dei singoli."

657 Manenti, contributo critico, p. 33: "Così, si era formata quella teoria sul sistema contrattuale romano, che si ritrova anche oggi incontestata e fedelmente riprodotta in tutti i migliori e più recenti trattati di diritto moderno

The second justification for the state of exception in private Law is the erosion of the public-private divide, allowing for the incorporation of concepts from the public sphere into the private domain. This process is facilitated by the increasing number of situations in which private agreements are deemed non-binding, necessitating a temporary suspension of contractual obligations. Such contractual suspensions reveal the inability of contract law to adapt to real-life events and demonstrate a direct correlation with the state of exception in public Law, as both operate under the same logic of anomie.

The constant adaptation of the Law to align with factual events undermines the process of universalization, transforming the Law into a custom-made solution for each unique situation. I this scenario, the very existence and purpose of the Law come into question, as its capacity to provide a universally applicable framework for resolving disputes is diminished.

The current epoch presents a paradoxical landscape in contractual Law, marked by a distinct tension between societal heterogeneity and the simultaneous expectation of uniform legal recognition. Individuals now assert their unique moral and religious beliefs within a diverse social fabric yet anticipate the state to recognize and respect this multifaceted diversity[658]. This tension mirrors the complex dynamics of contemporary production and consumption.

On the one hand, society is perceived as a homogenous entity, a vast mass-consumption market satisfying previously non-existent needs. Conversely, each individual is recognized in their distinctiveness, highlighting the interplay between mass society and individualism [659].

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e che per la parte che più specialmente ci riguarda, può con parole di un illustre trattatista essere riassunta in questi termini: <<Non ogni contratto ha [in diritto romano] la forza (*Wirkung*) di produrre tra i contraenti una obbligazione fornita di azione. Anzi nel diritto romano più antico tale forza obbligatoria viene riconosciuta soltanto in contratti del tutto determinati e distinti per la loro forma e per il loro contenuto (causa), (*contractus*), e negata del tutto a tutti gli altri contratti (nuda pacta). Una serie di pacta tuttavia fu in appresso per il progressivo sviluppo del *ius civile* e *praetorium* equiparata ai contratti, di guisa che anch'essi hanno la forza di produrre un'obbligazione (così detti pacta vestita: adiecta, legitima, praetoria)>>."

[658] Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. MIT Press, 1996. p. 22.

[659] Bauman, Zygmunt. *Liquid Modernity*. Polity Press, 2000. p. 79.

This dichotomy shapes the underpinnings of contractual Law, demanding a nuanced understanding of the intricate balance between the collective and the individual, the standard and the unique.

Mechanical societies posit the homogeneity of individuals to maintain social cohesion—people feel connected through similar work, educational and religious training, and lifestyle, which Durkheim termed as "collective conscience" or "collective consciousness"[660].

As Durkheim alludes, the mechanical function of society relies upon a relatively undifferentiated social order, termed "mechanical," in a constant conversion into complex, differentiated, or "organic" societies. In increasingly advanced and organic societies, the differentiation of tasks amongst individuals fosters a nuanced web of interdependence. This phenomenon of interconnectedness coexists with a sense of individual isolation, reflecting a complex social dynamic. Loneliness partakes in the same universe of interdependence. Suppose a single worker at the Suzhou Industrial Park in China deems his tasks insignificant and halts his work. If his cessation of labor incites a similar response amongst the near million other workers, the reverberations would undoubtedly ripple across the global economy, influencing even the solitary resident of Monowi, Nebraska. Despite the apparent lack of shared cultural and legal experiences between these two individuals, they are intrinsically linked through the global supply chain from the Chinese factory to U.S. ports[661].

The tenet for imposing an imperative for contract law uniformization corresponds to this organic society's pervasiveness. However, if legal expertise is a device for extracting advantages from other parties in the contractual engagement, how can the Law be an instrument for maximizing benefits for the winners of the legal battle? Systems cannot converge, not because they are incommensurable[662], even though it could be the case, but because the

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[660] Durkheim, *The Division of Labor in Society*, 1984, p. 85.
[661] Slaughter, Anne-Marie. *A New World Order*. Princeton University Press, 2004. p. 85.
[662] MacIntyre, Alasdair C. *Incommensurability, Truth, and the Conversation between Confucians and Aristotelians about the Virtues*. University of Hawaii Press, 1991.

blending presupposes an agreed distribution of riches and the conformation with the instituted order, and that premise was not yet achieved[663].

Even though a contract must be crafted so that it can be comprehended and interpreted accurately by diverse actors across disparate legal jurisdictions, it still carries the remnants of the exploitation of unfair exchanges. The lawyer in a U.S. law firm drafting the contract and the judge on the other side of the globe interpreting it must share a common understanding of its terms and conditions, also the silenced features of unjust exchanges.

In the transnational framework, as Anne Orford correctly observes, the contractual bodies of law created under the World Trade Organization's watchful gaze aim to harmonize disparate domestic normative systems[664]. However, beneath the surface of this ostensibly benevolent objective of promoting "economic life without friction"[665], lie the more self-serving interests of those who are the vanguards of global capitalist enterprises. Consequently, the narratives of legal certainty, propagated as the ideal models, often serve the specific interests of these pioneers rather than offering a universally beneficial framework. The call to evaluate and calculate risks underlie a drive for benefiting from others, in that sense, nations' sacrifices.

In an interconnected world, the language and structure of contractual agreements require utmost clarity and consistency, especially as myriad legal actors contend for recognition in the prestigious global legal arena. This is not to suggest that the inevitable result of this blending will be the domination of eminent legal traditions birthed in the geopolitical restructuring that followed the World Wars and the Cold War[666]. On the contrary, the possibility exists that legal traditions on the receiving end of these disseminated models may

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663 Mattei, Ugo; Nader, Laura. *Plunder: when the rule of law is illegal, Blackwell Publisher*, 2008. p. 28.

664 Orford, Anne. "Beyond harmonization: Trade, human rights and the economy of sacrifice." *Leiden Journal of International Law*, vol. 18, no. 2, 2005, pp. 179-213. p. 188.

665 Kennedy, David. "Hatchard, Law and Developments." *Law and Development: Facing Complexity in the 21st Century*, edited by Perry-Kessaris, A. Routledge-Cavendish, 2003. p. 17.

666 Dezalay, Yves; Garth, Bryant. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. University of Chicago Press, 1996. p. 45.

exhibit a stronger resilience to change. Thus, transplanted legal models potentially possess the adaptability needed to conform to a plural legal order rather than being subsumed by the prestigious traditions to which they were endowed[667].

Despite the appeal of functionalist uniformity in legal theory, particularly in contractual law, its reception within the legal field has been marked by skepticism. This is primarily due to its tendency to overlook the cultural disparities that facilitate societal growth and development in the first place[668]. Indeed, it requires a delicate balance to identify and appreciate commonalities while also giving due regard to the particularities unique to each legal culture[669]. Scholars invested in bridging this cultural divide must tread carefully to not inadvertently undermine the '*criptotypes*'—fundamental elements deeply rooted within a given legal system—that Rodolfo Sacco so emphatically foregrounds[670].

These societies are held together by the interdependence of their parts (individuals and institutions), much like the organs of a living body. Durkheim referred to this type of social bonding as "organic solidarity"[671].

In recognizing that the division of labor may also lead to social conflicts when it is not appropriately regulated, the calls "*anomic division of labor*" leads to what Durkheim defines as anomie, also eroding the intimate souls of beings, bringing the exception within the boundaries of the being[672]. This occurs when the rules governing individuals' relationships with each other are vague or not well-defined, causing conflicts and social instability.

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667 Watson, Alan. *The evolution of Western private law*. JHU Press, 2001. p. 193.
668 Legrand, Pierre. "European Legal Systems Are Not Converging." *International and Comparative Law Quarterly*, vol. 45, no. 1, 1996, pp. 52-81. p.62.
669 Zweigert, Konrad; Kötz. *An Introduction to Comparative Law*. Clarendon Press, 1998. p. 34.
670 Sacco, Rodolfo. "Legal Formants: A Dynamic Approach to Comparative Law." *American Journal of Comparative Law*, vol. 39, no. 1, 1991, pp. 1-34. p. 21. See also Gordley, James. *The Eclipse of Classical Thought in China and the West*. Cambridge University Press, 2022. p. 35.
671 Durkheim, *The Division of Labor in Society*, 1984, p. 106.
672 Durkheim, *The Division of Labor in Society*, 1984, pp. 291.

A paradox that Durkheim confronts when Rousseauian social contracts give place to a more pulverized exercise of wills concerns the erosion of societal common foundations that enabled the theory of social contract to consolidate:

> *"By this Spencer does not mean that society ever rests upon an implicit or formal contract. The hypothesis of a social contract is, on the contrary, irreconcilable with the principle of the division of labour. The greater the importance one ascribes to the latter, the more completely must one abandon Rousseau's postulate. This is because for such a contract to be feasible, at any given time all individual wills should be in agreement regarding the common foundations of the social organisation and consequently every individual consciousness should pose to itself the political problem in all its generality."*[673]

Durkheim's anomie, a state of normlessness, suggests a disconnection between individual drives and communal norms[674]. This concept aligns with Butler's *'bare life*', a discursively produced subject deemed unintelligible and thus disposable, absent moral concern[675].

Disposability echoes Binding's perception of individuals and their societal value[676]. The intersection of these notions illuminates the sacrificial nature inherent in contractual obligations. Rather than being value-neutral entities, contracts encapsulate this sacrifice; they require individuals to relinquish certain freedoms for the perceived benefits of communal norms and legal protections.

Yet, the anomie and 'bare life' conditions enlighten the precariousness of such sacrifices, particularly when norms and protections are suspended or disrupted, creating potential fissures in comparative law's attempt to establish uniformity amidst diversity. The state of exception in private Law can be justified through its historical roots in Roman Law and the evolving

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673 Durkheim, p. 150

674 Durkheim, Émile. *Le Suicide: Étude de sociologie.* Félix Alcan, 1897. p. 159.

675 Butler, Judith. *Frames of War: When Is Life Grievable?* Verso, 2009. p. 38: "So, one way of posing the question of who "we" are in these times of war is by asking whose lives are considered valuable, whose lives are mourned, and whose lives are considered ungrievable. We might think of war as dividing populations into those who are grievable and those who are not. An ungrievable life is one that cannot be mourned because it has never lived, that is, it has never counted as a life at all."

676 Binding, Karl; Hoche, Alfred. *Die freigabe der vernichtung lebensunwerten lebens: Ihr mass und ihre form*. F. Meiner, 1920. p. 2.

relationship between the public and private spheres. This entangled interplay between *religio*, *fides*, and *exceptio* provides the operative tools for the development of legal principles and practices, while the increasing need for contractual suspensions reflects the challenges faced by modern legal systems in adapting to the complexities of contemporary life.

These two grounds for justifying the state of exception in Private Law will operate as a device for rescuing its origins and creating a forecaster's model for the future. The first, on the origins of *exceptio* itself in the Roman Law as a defense before the praetor, followed by the institutions it created. The other constituting the erosion of a public-private divide, allowing for incorporating an analog from the public sphere into the private realm. The growth of situations in which private agreements are not binding justifies a momentaneous contractual suspension that, in its turn, explains the nonconformity of the Law of contracts to life-occurring factual events.

Therefore, the correlation to the state of exception in public Law is direct since the same anomic logic applies. If the veil of the Law is constantly pierced to alter its content and conform with factual events, the conversion of universalization into a law tailored for every singular situation loses its meaning. There is no reason for Law's existence if it does not have the aspiration for being universal, but at the same time sensitive to the particular, to be the earthly incorporation of *Dike*[677]. Like the laws of physics, no scientist would expect that the laws of gravity apply differently for different individuals, the equations will assume a universal coefficient for it and calculate for every individual according to their body mass, the weight between individuals fluctuates, the law endures.

[677] Gagarin, Michael. "Dike in archaic Greek thought." *Classical Philology*, vol. 69, no. 3, 1974, pp. 186-197. As the author demonstrates, not all uses are necessarily connected with justice.

III. Exceptions and Defenses Across Legal Systems: The Intersection of Public and Private Law

III.I. The Interplay of Contractual Sacredness and Fairness: Exploring Open Clauses, and the Dynamic Balance between Pacta Sunt Servanda and the Rebus Sic Stantibus Principle

The previous chapter concluded with Durkheim's notions of mechanical and organic solidarity, elucidating the intricate social matrix within which the Law operates. As society complexification exited the constructs of mechanical solidarity – characterized by similarity among individuals, organic solidarity emerged from individuals' differences and interdependencies, creating the need to recognize these paradigms as instrumental in deciphering the challenges of treating exceptions and defenses that parties may raise on the bases of higher principles of equity and shared assumptions as those principles also disappeared as the safety net parties rely on[678]. Those exceptions gain even sharper contours to assess war[679], emergencies, and situations where disruption dismantles the instituted order rooted

[678] Durkheim, Emile. "Organic solidarity and contractual solidarity." *The Division of Labour in Society*. Macmillan Education UK, 1984. p. 150: "By this Spencer does not mean that society ever rests upon an implicit or formal contract. The hypothesis of a social contract is, on the contrary, irreconcilable with the principle of the division of labour. The greater the importance one ascribes to the latter, the more completely must one abandon Rousseau's postulate. This is because for such a contract to be feasible, at any given time all individual wills should be in agreement regarding the common foundations of the social organisation and consequently every individual consciousness should pose to itself the political problem in all its generality." A paradox confronted by Durkheim when Rousseauian social contracts gives place to a more pulverized exercise of wills concern the erosion of societal common foundations that enabling the theory of social contract to consolidate.

[679] Friedmann, W. *Law in a Changing Society*. Stevens & Sons Limited, 1959. p. 112-113: "Before the First World War, physical or legal impossibility was the only means by which contract could be discharged, apart from breach of contract. The First World War produced the problem of frustration of contract, as a result of political, social, or economic upheavals. A further impetus was given to the doctrine by the post-war inflation in Germany, which led to import judicial developments, especially to the doctrine of 'foundation of contract'. The French doctrine of imprévision in administrative contracts also had considerable influence. What emerged was a doctrine which, in civil, commercial, and industrial relations, supplemented the strict categories of impossibility by 'frustration of contract, where war, devaluation, major social unrest, or similar factors beyond the control of the parties had vitally affected the ability of one or both parties to perform. By now the doctrine of frustration is an established part of most civil and common law jurisdictions. This is mainly a reflection of the vicissitudes and uncertainties of a period of wars, international tensions, social revolution, and economic

from within and the prevailing narrative of simplicity and straightforwardness of problem-solving as if jurisdictional biases are absent and that all participants in the legal arena share the same values[680].

Although concise, Robert Gordon's exploration of Macneil and Macaulay's work on contract law provides a complete outline for why contract law authors must be studied in light of Durkheim's modes of solidarity[681]. Aiming to bridge the gap between theoretical and practical experience, Gordon emphasizes the stark contrast between individualist-transactional doctrine and solidary-hierarchical-relational practice. This divergence brings to light the relational and embedded nature of contracts, as posited by Macneil and Macaulay. If studied closely, their theories are much more subversive compared to those developed by critical legal scholars, as they adhere to a reformulation of contract law ideals without necessarily

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upheavals. The law recognizes that these factor, due to national or international policies, go beyond reasonable calculation of economic risk, to safeguard which is the function of the law of contract."

680 Goupy, Marie. *L'état d'exception : ou l'impuissance autoritaire de l'État à l'époque du libéralisme*. CNRS éditions, 2016. p. 21: "La définition du libéralisme comme forme de pensée antipolitique prétend donc se situer en amont des théories libérales, en amont des analyses institutionnelles et juridiques mêmes, à un niveau épistémologique et plus généralement systématique, qui met en lumière la signification de l'ordre libéral compris aussi bien comme ordre concret que comme mise en ordre conceptuelle. Elle consiste dans une tentative de dégager le sens d'un ordre dont les institutions, le droit, la structure sociopolitique, mais aussi les théories, pointent dans une même direction : celle d'une négation du politique – ou d'une dépolitisation de l'ordre sociopolitique, qui se traduit concrètement dans un effort systématique visant à relativiser le pouvoir de l'État et, plus généralement, par la production d'un ordre sur lequel la décision politique n'a globalement plus de prise. C'est dans le cadre d'une telle lecture qu'il convient de comprendre la discussion que Schmitt développe avec la théorie marxiste et son interprétation rigoureusement économique des crises. » The author describes liberalism as an anti-political thought form that transcends individual liberal theories and institutional and legal analyses and moves into the realms of epistemology and systematics. This order, characterized by institutions, laws, sociopolitical structure, and theories, strives to negate the political by systematically minimizing state power and producing an order largely untouched by political decisions.

681 Gordon, Robert W. "Macaulay, Macneil, and the discovery of solidarity and power in contract law." *Wis. L. Rev.*, 1985, p. 569: "What Macneil and Macaulay brought to surface awareness was that the images of classical contract law described at best a small and residual body of contract dealings: "discrete transactions" (in Macneil's phrase) between strangers. The common type of commercial exchange was among participants in continuing relations, members of interactive communities whose projects themselves, as well as expectations about how they will be carried out, are partially created by the community. In classical contract, individuals have no obligations to each other save those created by the coercive rules of the state or their own promises:'4 if contract law outcomes are therefore to be rationalized on the preferred grounds of consent rather than those of public policy, the outcomes must appear to flow from the parties' promises, from their ex ante allocations of performance obligations and risks, or at least from a plausible implication (or transaction-cost-saving legal approximation) of such promises. In the "relational" view of Macaulay and Macneil, parties treat their contracts more like marriages than like one-night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate."

challenging the political system and risking losing the contractual narrative for broader claims. Their pioneering work shows us that the neat, compartmentalized notion of a contractual agreement is far from reality.

Instead, contractual relations are multifaceted, ever-evolving, and deeply embedded within a broader socio-economic context. Thus, as one further engages with the complexities of contract law, the outcome is embracing a richer, more nuanced understanding of economic relations, taking into account not only the legal stipulations of the contract but also the shared assumptions, social norms, and principles of equity that underscore these relations[682].

In a period of less complexity, parties behaved more predictably since they entrusted the others with expectations on how each one should behave. Whereas the holders of power ensured stability, those exploited conformed to act according to their status. Durkheim sociological mechanical solidarity accommodated the former world order as contractual definitions and contractual entitlements. On the other hand, the increasing complexity brought about by early industrialization, the increase of commerce, and the circulation of goods and

[682] Hale, Robert L. *Freedom through law: Public control of private governing power*. Columbia University Press, 1952. viii: "However, the freedom from private control is not always a more vital liberty than the freedom to exert that control. Such economic bargaining power as each of us possesses is a power to exert some degree of coercion over others, but the freedom to exert that power may be more important to our own liberty than freedom from our coercion would be to the liberty of others." p. 366-367: "Enforcement of the obligations of a contract must be regarded as a compulsory act of government, even if we ignore the compulsory factors which induced the parties to make the contract in the first place and assume that they made it voluntarily. Compulsion to render services which one has contracted to perform, said Justice Hughes in Bailey v. Alabama, 'would be not less involuntary because of the original agreement.' Although Hughes thought that liability to pay damages for breach of the contract did not expose one to enforced labor, it must be clear that one who does what he has promised only to avoid a suit for damages is acting under compulsion." Hale, Robert L. *Freedom through law: Public control of private governing power*. Columbia University Press, 1952. p. 367: "They (parties) may subject each other to the obligations to which the legislature could not validly subject them. That is, they my induce each other to give up some of their constitutional rights, and, having given up a constitutional right by contract, a person's conduct may be forcibly controlled by law in a way in which it could not otherwise be controlled." He then reefers to Justice's Holmes opinion in Power Mfg. Co. v. Saunders, 274, U.S. 490 (1927), in which Holmes remarked: "In order to enter into most of the relations of life, people have to give up some of their Constitutional rights. If a man makes a contract, he gives up the Constitutional right that previously he had to be free from the hamper that he puts upon himself. Some rights, no doubt, a person is not allowed to renounce, but very many he may. So we must go further than merely to point to the Fourteenth Amendment. I see nothing in it to prevent a foreign corporation's agreeing with the state that it will be subject to the general law of torts and will submit to a transitory action wherever it may be sued." See also Hale, Robert L. "Bargaining, duress, and economic liberty." *Columbia Law Review*, vol. 43, no. 5, 1943, pp. 603-628, and "Coercion and distribution in a supposedly non-coercive state." *Political science quarterly*, vol. 38, no. 3, 1923, pp. 470-494.

individuals through continents dramatically augmented the flow of capital and required many juridical adjustments to comport the forming of organic solidarity.

Naturally, the transition did not come without clashes and reconceptualization through the construction of the human condition's devices of exploitation: initially slavery and forced labor, to the gradual deployment of hour-wage contractual arrangements with peasants' newly acquired freedom to engage in contractual transactions. To adjust to capital flows, the gradual consolidation of nation-states around a national identity backed by goldy resources obtained from the American colonies enables solidarity to detach from individuals[683], allowing for the emergence of the term Macneil deploy as discrete transactions replacing primitive agreements based on values no longer shared in the social matrix.

The State assumed the role of solidarity's grantor, permeating the space between individuals[684]. But the void left by the disintegration of mechanical solidarity would not be permanently filled by the State, nor by discrete transactions that achieved a level of juridical sophistication that escaped parties' capacity to regulate it. Continual contractual relations required another approach since long-term contractual relations imposed a step back to the primitive forms in which society conducted transactions. For instance, a gift, if pictured in the short time frame in which the operation takes place, can limit the observer's perception of what has been exchanged, involving the exchange of favors, symbolic display of power, the exercise of authority, and hierarchy that classical economics cannot regulate**.**

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[683] Eichengreen, Barry J. *Golden fetters: the gold standard and the Great Depression, 1919-1939*. NBER series on long-term factors in economic development. Oxford University Press, 1996.

[684] Solari, Gioele. Individualismo e Diritto Privato. G. Giappichelli, stampa 1959, p. 32 on Locke's disregard for the salus publica and *dominium eminens* doctrine.

Organic solidarity as applied to Law attempts to bring into legality contingencies that the Law cannot grasp, since its adjective conception portrays an ideal scenario, the Law operates as rules are obeyed. Whereas in the procedural unfolding of exchanges[685], conflicts allow for the facts to manifest themselves in a disputed reality of a battle[686].

However, when this belief is contested, when the future hinges unpredictability for all participants of the social matrix, even the solutions already provided to cope with the unforeseen proves to be insufficient. The Law rules over past and rehearses the future. However, for long-term contractual relations, particularly the ones that galvanize unforeseen futures, it is required a contractual solution escaping atomized, all-encompassing contractual planning defined by Ian Macneil as discrete transactions as "*one in which no relation exist between the parties apart from the simple exchange of goods*."[687]

Macneil suggests, instead, adopting a relational contractual approach, taking the complexities of a social matrix that no longer shares the social beliefs that tied members into mechanical solidarity. With the disappearance of mechanical solidarity, the principles orienting the parties to obey some precepts disintegrated, and as he deemed, "the burocratization"[688] of

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[685] Zimmermann, Reinhard. The Law of Obligations: Roman Foundations of the Civilian Tradition, Oxford University Press, 1990, p. 6: “since Roman Law was an actional law, it mattered little whether an agreement was to be regarded as binding if no suitable procedural formula was available to enforce it.”

[686] MacNeil, Ian. The New Social Contract: An Inquiry into Modern Contractual Relations. Yale University Press, 1980, p. 92: “"[I]s pinned on psychology - not on sociology, economics, Law, politics, or force, but on psychology. Such solidarity beliefs exist as long as each person in a relation can give an affirmative answer to the following question: Do I think conditions will continue to exist whereby each of us will desire to and be able to depend on the other? To the extent that an affirmative answer cannot be given organic solidarity dissapears. [...] This psychological content relates closely to the other contract norms. It was early asserted that in the absence of those norms contractual relations fall apart. Most of them have a bearing on the psychology of organic solidarity. A belief in future interdependence is unlikely to endure, for example, if future prospects are seen as so lacking in mutuality - as so uneven in exchange - that the believer envisages deterioration into conflict or separation rather than cooperation.”

[687] MacNeil, Ian. The New social contract: an inquiry into modern contractual relations, New Haven; London: Yale university press, 1980, p. 10.

[688] Hibou, Béatrice. The Bureaucratization of the world in the neoliberal era: an international and comparative perspective, translated by Andrew Brown, New York: Palgrave Macmillan, 2015, p. 64: “The contract cannot foresee all eventualities; in particular, it cannot be entirely unambiguous, and cannot be read the same way by all the parties involved. It is necessarily subject to interpretation, whether this be of the calculation of prices and costs, the reality of the amount of investments to be made or already made, or the evolution of the context and the environment (legal and regulatory, but also economic, institutional, and territorial). Likewise, the

contractual stipulations would not suffice the results caused by the loss. Drawing from Durkheim, what Macneil offered in developing his contractual relation theory was to coalesce Law within a broader perspective and within the scope of Law, to join disciplines as apart as civil and administrative Law under a different sort of moral base[689].

Relational contracts contrast with the traditional legal perspective of discrete transactions. In discrete transaction theory, contracts are seen as a one-off, fixed exchanges of mutual obligations that are primarily governed by the explicit terms and conditions set out in the contract document. Each transaction is seen as isolated, with little or no consideration of the broader relationship between the contracting parties or the context in which the transaction takes place. Relational contract theory, on the other hand, sees contracts as ongoing, evolving relationships that extend beyond the specific terms and conditions outlined in the contract. These relationships are governed not only by the formal contract, but also by a host of implicit norms, expectations, and understandings that develop over time.

In terms of the study of exceptions in private Law, the relational contract theory provides a more flexible and dynamic perspective. It recognizes that unexpected situations (exceptions) may arise that are not explicitly covered by the terms of the contract. These exceptions may lead to contract breaches and litigation from a discrete transaction perspective.

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actors cannot fail to have different interpretations of the timeframes, strategies, and visions involved, given their own positioning, their interests, their careers, and the place they occupy in society. Distributing dividends or investing and choosing between different investments does not mean the same, does not have the same consequences, and is not interpreted in the same way by the shareholders in a group, the international markets, the donors, the national decision makers, the local authorities, and the populations. If conflict should arise, bureaucratization also appears to be fuelled by the intensive use of experts who, whatever their positions or their opinions, share a juridical reading of the partnership and adopt a procedural or even litigious approach." Also, to represent the device of the utmost bureaucratization of society into a net of infinite discrete transactions, Macneil uses Jacques Ellul's "Technical Man." On Macneil's vision, p. 108: "The Technical Man is always a man of purpose and a constant planner. Being a social creature of purpose and a constant planner. Being a social creature of purpose and planning, Technical Man is a seeker of power. Without power - the ability to inflict his will on others irrespective of their whishes or by manipulating their whishes - his plans go awry and his purposes are thwarted. It makes no whit of difference whether Technical Man is a so-called private entrepreneur, a social worker in a Western welfare system, or a state planner in a socialist state, he must have power if he is to succed."

[689] MacNeil, p. 94-95.

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[690] Ibid, p. 108.

exceptions may lead to contract breaches and litigation from a discrete transaction perspective. However, from a relational perspective, the parties are more likely to work cooperatively to adapt the contract or find a mutually acceptable resolution to preserve their ongoing relationship.

So, the distinction between discrete transactions and relational contracts is significant in the context of exceptions in private Law. It affects how exceptions are interpreted, managed, and resolved, with implications for legal outcomes as well as for the quality and longevity of the contractual relationship.

Ian Macneil's discrete transactions and contractual relations constitute the point of departure of the present analysis, evaluating the path of a long-term contractual relation governed by legislative principles and a complex arrangement of transactions that ultimately refers to the maintenance of a given order.

Contract law confronts on its kernel the delicate core of balancing the sacrosanct principle of contractual obligations with the complexities of real-world execution, requiring softening its rigidity with the multitude of legal tools invoking equity to confer the decision-maker the power to bypass parties' original intents.

When the allocation of costs from economics is transferred to the Law, as it was since the Law and Economic movements emerged with total strength, relations on the monetary and symbolic threshold confront a rigid system's limitation that the system is not apt to address. If not for that reason, the theory of cause could have been left unexplored, as it would never be the business of the Law to command how individuals exercise choice. But Private Law's trade pervades the secrecy of the household as much as Public Law does. It matters if a decedent gifts his mistress with a house part of his estate in jurisdictions having forced heirships since a legislative command imposes how wealth will be allocated in the event of death. The Law

constantly controls if parties engage in relations overseeing organic solidarity because State enacted Law assumes the once-governing pluralistic order that private parties cannot defy[691].

Revisiting the viewpoint through which these relationships are examined - specifically via the lenses of general frustration and particular exceptions - it becomes manifestly clear that within the context of relational contracts, the balance of power emerges as an ongoing contestation between contracting parties. In a paradigm that solely emphasizes the maximization of self-interest, the Law itself risks marginalization from the legal discourse, given that the panoply of remedies and equitable solutions is fundamentally rooted in principles of justice that inherently contradict economically oriented preferences[692].

Additionally, since the language of impossibility and *force majeure* circumstances goes as far back to the Roman sources, it is relevant to acknowledge the changing nature of contractual obligations. From its birth, as the formulas left the evidence of the very limited contractual arrangements parties could enter, long duration was not a feature of those arrangements, so much so that the Digest stated *Inpossibilium nulla obligatio est*[693]*,* "there is no obligation to the impossible", that performing the impossible does not induces to liability. However, as the canonists and natural lawyers found a world that did no longer resemble the former order[694], with argumentative twists they conveyed a theory of impossibility based on supervening circumstances.

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691 Dawson, John P. *Gifts and promises: Continental and American Law compared*. Yale University Press, 1980. p. 1: "Can a fully capable person make a binding promise to another to give or do something for nothing? For countries within the sphere of influence of the English common law, the standard answer would be yes, since they have never suffered from the blight that afflicts countries adhering to the English common law - the requirement of bargain consideration."). For an explanation for the refinement of gifts as a device for transfers through trust in the common law tradition see Gorla, G. "Causa, consideration e forma nell'atto di alienazione inter vivos." *Riv. dir. comm*, 1952, pp. 257-274. p 270: "come si vede, la common law mediante l'istituto del trust, opera dell'equity, è giunta al riconoscimento della donazione in modo molto più largo che la civil law."

692 MacNeil, Ian R. "Economic analysis of contractual relations: Its shortfalls and the need for a rich classificatory apparatus." *Nw. UL Rev.*, vol. 75, 1980, p. 1018.

693 Dig. 50.17.185

694 Gordley, James; Von Mehren, Arthur Taylor; Jiang, Hao. *An introduction to the comparative study of private law: readings, cases, materials*. Cambridge University Press, 2021. p. 249-250: "The canon lawyers did not have a theoretical explanation for the doctrine. It just seemed reasonable to them. An explanation was proposed by Thomas Aquinas on the basis of an idea he took from Aristotle and was eventually adopted by the late scholastics in the sixteenth century. The idea was Aristotle's theory of "equity." According to Aristotle, since

In that regard, Buckland greatly contributed to elucidating the contrasting treatment between Roman and modern law regarding supervening impossibility or *casus*. Central to this discussion are two distinct forms of contractual obligations recognized in Roman law, those enforceable under *stricti iuris* and those under *bonae fidei iudicia*. The former primarily involves unilateral obligations such as *stipulatio* (a formal promise), where if performance becomes impossible without the promisor's fault, they are released from liability. However, in bilateral business relations, the effect of such release by *casus* remains unclear up to current days. In contrast, modern Roman law had no difficulty releasing the party on unilateral contracts, as it did not recognize *stricti iuris* obligation as part of its scheme[695]. This discussion raises crucial questions regarding the obligation and the effect of release due to supervening circumstances, particularly when the contract is complex or bilateral and extended in time. As the narrative mentioned earlier proposed, special features emerge in the complexity of modern-day transactions: the expansion in time and space of those transactions, the bilateral constitution, the multiplicity of objects, and expectations of perfomance.

When rampant calamities, emergencies, and wars reach societies, the inadequacy, or at least difficulty of conciliation between past and present, pervades legal discourses, attempting once more to prove a consistent framework for a weak theory of frustration. One case Buckland uses to illustrate the idea, Cantiere San Rocco[696], amalgamates the sphere of war and the

laws are made to serve purposes, circumstances can always arise in which obeying the law will no longer serve the purpose for which it was made. Under these circumstances, the law maker would not want it to be obeyed. Therefore, as a matter of "equity" it should not be obeyed. Aquinas said that a promise is like a law that a person makes for himself."

695 Buckland, W. W. *Elementary principles of the Roman private law*. Cambridge University Press, 1912. p. 287: "In contracts strict iuris there was no remedy but, possibly, the actio doli, if damage resulted; that is to say, there was no remedy at all against the other party ignorant of the impossibility. As to supervening impossibility, impossibility arising after the contract was made (which was in the Roman law more usually called not impossibility but casus), the general rule was that the party whose performance was made impossible, without any fault or fraud, was released — lex non cogit ad impossibilia. It is in conformity with this principle that the vendor is released by the accidental destruction of the thing sold before delivery, while the buyer is still liable to pay the price."

696 Cantiere San Rocco SA v Clyde Shipbuilding & Engineering Co Ltd (1923) SC (HL) 105. Cantiere San Rocco is a seminal case in the annals of contract law that served to clarify principles in situations where unforeseen circumstances prevent the fulfillment of an agreement. In 1914, Clyde Shipbuilding and Engineering and Cantiere San Rocco entered into a contract to manufacture and deliver marine engines, with Cantiere San

overarching *force majeure* implications caused by the event on a multitude of contractual obligations. In the case, the performance of an agreement between a Scottish and Austrian company to supply marine engines became impossible with the outbreak of war, and the Court held that the deposit paid must be refunded. A modern interpretation of Roman law principles significantly influenced the decision under Scots law. This ruling accentuated the complexity of the treatment of contracts under varying jurisdictions and the influences of Roman law on modern systems[697].

The axiomatic principle of '*pacta sunt servanda*,' when extrapolated to situations that deviate from the initial promises made, is likely to lose its primacy in the face of manifest injustice resulting from obliging one party to perform in a manner detrimental to its interests.

Conversely, the ethical underpinning of a promise might not constitute a primary concern within an economic calculus, provided the parties' anticipations align and the predictability of the venture is assured. The value system in an economic analysis does not incorporate the abstract notion of justice. Instead, it seeks to reduce allocation costs and foster market predictability, disregarding justice as a component in the calculation.

However, for the Law, even if the outcomes achieved align with a set of economic objectives, the values steering the system diverge. Legal perspectives are influenced by a wider range of considerations, including promoting fairness, social justice, and ethical behavior. The

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Rocco paying an initial 20% of the total price. However, the onset of the First World War rendered the contract impossible to fulfill. Cantiere San Rocco sought restitution of the initial payment, invoking the principle of failure of consideration due to the lack of fulfillment of contract terms. The House of Lords, while appreciating the differences between English and Scots law, upheld the appeal based on Scots law's foundation in Roman law, which allowed the recovery of money in instances where the expected results did not follow. The principle of restitution was thereby applied, with Clyde Shipbuilding required to repay the initial sum plus court costs.

697 Buckland, W.W. *Arnold, McNair, Roman Law and Common Law*. Revised by F. H. Lawson. Cambridge University Press, 1965. p. 239, "But most business relations are bilateral: a stipulatio would not usually stand alone; there would commonly be an undertaking, e.g. a stipulation on the other side, or some service on the other side would have already been rendered. In such a case the question arises: What is to happen if one party to a pair of stipulations has been released by casus before anything has been done?" This passage clearly delineates the crux of the issue at hand, discussing the difference between unilateral and bilateral obligations, and the questions that arise from the impossibility of performance in such situations."

Law constitutes an ought that, according to Macintyre's readings of Hume's, "*there can be no connections between factual statements and moral judgments*."[698]

The maxim *pacta sunt servanda*, when stressed for situations not conforming with the original promise, tends to lose its primacy before the injustice of forcing one of the parties to a perfomance that produces harm for the burdened side. On the other hand, the moral value of a promise does not constitute a paramount economic concern as long as the parties' expectations are matched, fulfilling the predictability of an enterprise. By observing how multiple legal systems deal with frustration, breaches, and circumventing a given promise in present legal documents and past historical sources, concerns of justice surface as the commanding value.

Regardless of the nature of the actors involved in an agreement or the ends parties aim to achieve while celebrating contracts, systems aspire to comply with a set of values that, depending on the legal tradition involved, tend to prioritize distribution or certainty. To provide a controlling example of which of those values gain prominence, one must consider the sanctity of contracts as a superior value while approaching frustration in the English tradition, being the prevalence of this principle the reason why England maintained for centuries a tradition of reducing excuses for frustration apart from the equitable remedies supplied in the courts of equity. Conversely, the German tradition inoculated good faith as a constituent of contractual freedom. The French, on the other hand, recently adopted an open system, meaning that "courts can eventually be authorized to discharge but also to adjust a contract"[699].

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[698] MacIntyre, A. C. "Hume on Is and Ought." *The Philosophical Review*, 1959, pp. 451-468. p. 455: "How does this bear on the interpretation of Hume? It might be held that, since Hume holds in some passages on induction at least that arguments are deductive or defective, we could reasonably expect him to maintain that since factual premises cannot entail moral conclusions-as they certainly cannot-there can be no connections between factual statements and moral judgments (other perhaps than psychological connections)."

[699] Oosterhuis, Jawillem Pim. *Commercial Impracticability and the missed opportunity of the French Contract Law Reform: Doctrinal, historical and Law and Economics Arguments – Comments on Lutzi's introducing imprévision into French Contract Law*, pp. 113-129. p. 116. The interesting aspect of the French system is that is born with the synecdoche, which means under Professor Monateri's categories that it conceals the real intent to pass something simpler complying to the tradition to thereafter evolve case law in its own manner. See Monateri and Lasser.

Seneca's phrase '*Omnia esse debent eadem, quae fuerunt, cum promitterem, ut promittentis fidem teneas*...' translates to "all things ought to be the same as they were when I made the promise, in order to hold the promisor to his word..." introduces a principle about promises[700], in that the conditions under which a promise was made need to remain constant in order for the promise to hold. A significant change of circumstances might alter the promise's validity or obligation.

The r*ebus sic stantibus clausula* manifests situations where the fulfillment of a promise or contract may be affected by changing circumstances. For instance, in a legal context, if the conditions under which a contract was formed significantly change (a principle known as "*clausula rebus sic stantibus*" or "things thus standing"), the performance of the contract could be altered or excused. In a more general or moral context, it suggests that a promise is contingent on the circumstances that existed when the promise was made. If those circumstances change dramatically, the obligation to fulfill the promise might be altered. In reality, when the change of circumstances dramatically affects the nature of a contract, the result is that bounded by the former promises, parties commit to an overhauled contract without having previously agreed to it. The rationale behind the need to discharge a contract and damages for breaches undergo the values the system will protect, certainty or good faith, as

[700] Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford University Press, 1996. p. 579: "One of the most interesting, and potentially most dangerous, inroads into pacta sunt servanda has, however, been the so-called clausula rebus sic stantibus: a contract is valid only as long and as far as (literally:) matters remains the same as they were at the time of the conclusion of the contract. It is obvious that such a proviso, if broadly interpreted, can be used to erode the binding nature of contractual promises very substantially; not surprisingly, therefore, the clausula doctrine fell into oblivion in the late 18th and the 19th centuries: the heyday of 'classical' contractual doctrine when freedom of contract, economic liberalism and certainty of law reined supreme. The Roman lawyers had not know anything like it either. Moral philosophers were the first to draw attention to the change of circumstances and thus to sow the seed for the clausula rebus sic stantibus. 'Omnia esse debent eadem, quae fuerunt, cum promitterem, ut promittentis fidem teneas...' this general proposition, which was to be quoted time and time againm had originally been formulated by Seneca. Equally influential was the example of the sword which does not need to be returned to a depositor who has become insane. It goes back to Cicero, De officis, ('Si gladium quis apud te sana mente deposuerit, repeat insaniens, reddere peccatum sit, officium non reddere') and was taken up by St. Augustine."

this is the ultimate value to justify why someone must be bound to a promise that would never choose if it was possible to anticipate the burden of assuming such promise.

In addressing the relationship between intention and circumstance in promise-keeping, Aquinas, in Part II-II, Question 110, Article 3, posits that a promise's authenticity hinges on aligning one's verbal commitment and intention to fulfill it. Nevertheless, he identifies two key exceptions to this rule. First, an inherently unlawful promise justifies a change of heart. Secondly, a shift in circumstances - concerning the individuals or the contextual promise - may warrant a deviation from the original commitment. Resonating Seneca's sentiments, Aquinas argues that the steadfastness of a promise requires the conditions under which it was made to remain consistent. Should these circumstances significantly change, neither does the promise maker lie at the time of the promise, given the assumption of certain conditions, nor is he faithless in not fulfilling it due to the altered circumstances? In his Summa, Aquinas adds depth to 'rebus sic stantibus' clause allowing it to be carried on by theologians forming the natural school and[701], subsequently, to Grotius. The following objection to the question "Whether every lie is a sin?" glances at an argumentative attempt to surpass the rigid constraints preventing an operative clause for change:

> *"Reply Obj. 5. A man does not lie, so long as he has a mind to do what he promises, because he does not speak contrary to what he has in mind: but if he does not keep his promise, he seems to act without faith in changing his mind. He may, however, be excused for two reasons. First, if he has promised something evidently unlawful, because he sinned in promise, and did well to change his mind. Secondly, if circumstances have changed with regard to persons and the business in hand. For, as Seneca states (De Benef. Iv), for a man to be bound to keep a promise it is necessary for everything to remain unchanged: otherwise neither did he lie in promising – since he promised what he had in his mind, due circumstances being taken for granted – nor was he faithless in not keeping his promise, because circumstances are no longer the same."*[702]

[701] On the theologians framing of the clausula, transferred Grotius' conception of the will see Rummel, Michael. "Die 'clausula rebus sic stantibus' : eine dogmengeschichtliche Untersuchung unter Berücksichtigung der Zeit von der Rezeption im 14. Jahrhundert bis zum jüngeren Usus modernus in der ersten Hälfte des 18. Jahrhunderts." Baden: Nomos-Verl.-Ges., 1991, pp. 96-101.

[702] St. Thomas Aquinas Summa Theologica, complete English Edition in five volumes, translated by Fathers of the English Dominican Province, vol. III, II.II, QQ. 1-148, Allen: Christian Classics, 1981, p. 1661, II-II, Q. 110, art. 3.

Pacta sunt servanda and *rebus sic stantibus* represent two competing principles that conflict in many jurisdictions. While *pacta sunt servanda* aims to maintain the sanctity of contracts, r*ebus sic stantibus* allows for contractual obligations to be altered or terminated when there is a significant change in circumstances.

Visiting the literature of common law jurisdictions, it is noticeable that it prioritizes the sanctity of contracts instead of *rebus sic stantibus*. In the United States, the United Kingdom, Canada, and Australia, the principle of *pacta sunt servanda* largely dominates, reinforcing the notion of the inviolability of contracts. Rather than codified statutes, case law formulates doctrines akin to *rebus sic stantibus*. The doctrine of "frustration of purpose" provides relief when unforeseen events negate the principal reason for entering into the contract, essentially frustrating its execution.

Before entering the case that per se represent a new paradigm in the understanding of implied terms and impossibility[703], it is worth visiting the underlying conditions that enabled the doctrine to exist. For that task, valuable is Buckland's contribution on compiling valuable information on frustration in the Common Law[704]. Expanding his exploration on the subject,

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[703] Windscheid's theory of presupposition is not ontologically different from implied conditions, his "Die Voraussetzung"'s, conception or "presupposition," is central in his legal philosophy since when parties enter into a contract, they operate under certain assumptions or conditions that are not explicitly stated in the contract but are taken as understood by all parties. If these assumptions prove false or do not occur, it could fundamentally change the nature of the agreement, potentially delivering the grounds for adjusting or nullifying the contract. Windscheid's introduces in the legal discourse the legal basis for endorsing these unstated assumptions in contract law, arguing for the need to consider them when interpreting the obligations of the parties involved, emphasizing the nuanced and context-dependent nature of these presuppositions, asserting the necessity for their consideration in legal disputes and contract enforcement. Windscheid, Bernhard. Die Voraussetzung. Archiv für die civilistische Praxis, 1892, 78.H. 2: 161-202, p. 163: "Wer etwas voraussetzt, nimmt dessen Wirklichkeit an." Windscheid took the fundamental step for the development of the Wegfall der Geschäftsgrundlage concept with Oertmann, Paul. Die Geschäftsgrundlage : ein neuer Rechtsbegriff, Leipzig [u.a: Deichert, 1921], p. 1: „Aber Tatsache ist doch, daß erst Windscheid die Fragen meines Themas unter dem notwendigen allgemeinen Gesichtspunkt behandelt hat; daß sie sich erst unter dem bedeutenden Eindruck seines Buches zu einem Zentralproblem der modernen Rechtswissenschaft und -Anwendung her - ausgebildet haben, das Keinen mehr losläßt, der sich einmal ernsthaft darin vertieft hat. Zu einem Problem, über dessen geradezu ungeheure praktische Bedeutung uns erst die Lehren des Weltkrieges so recht die Augen geöffnet haben. Soviel steht heute unzweideutige fest, daß keiner unter Windscheid zahlreichen Widersachern, auch nicht Lenel als der weitaus bedeutendste unter ihnem, den befehdeten Begriff der Voraussetzung endgültig hat erledigen können; daß ihr Sieg bei der zweiten Beratung des BGB. Mehr Schein als Wirklichkeit gewesen ist

[704] The author extensively consults Pothier's theories as the seeds for supporting his doctrinaire constructions. See Pothier, Robert J. *Traité du contrat de vente, selon les regles tant du for de la conscience, que du for extérieur*

in his article titled "Casus and Frustration in the Common Law," Buckland offers a decisive differentiation between initial impossibility and supervening impossibility, by stating:

> *"Republican and Augustan Latin had no such word as* impossibilis*; the idea could be expressed, apparently, only in Greek. The word came into use early in the Christian era, but, in the field of contract, it was applied only to initial impossibility. What we call supervening impossibility was, for the Romans,* casus*, and its effect in different transactions was not always the same. The Roman law of the Romans, unlike the common law and unlike the various types of modern Roman law, had two systems of what may be loosely termed contractual obligation. Under the more ancient system, the remedies were stricti iuris; under the other, the remedies were bonae fidei iudicia."* [705]*(*

Buckland pointed out that this aspect will be extremely relevant to justify why, in Taylor v. Caldwell and later in the coronation cases, there was a clear impossibility distinction to justify discharge. Buckland's pointed out that Blackburn's opinion in Taylor v. Caldwell was not conforming with the nature of Roman doctrine since *casus* was unilateral in its effect. In the case "both parties" were to be released by *casus* if both performances became impossible, which was not the case. According to Buckland, if Roman Law were to be applied, it would release the obligation to pay, supposing that the theater owner was claiming its payment for the lease. To discharge the parties by *casus* both should be contemplated by impossibility. In his explanation:

> *"This is not the Roman rule, whereby casus merely releases; if it were, the price for hire would still be due. Casus in the Roman law was essentially unilateral in its effect. If both parties are relieved by casus, it is only where the casus makes both performances impossible. That the other party is also released in most bonae fidei contracts rests not upon release by casus but on the very different principle that, ex fide bona, a party ought not to be called upon to pay for a service he has not had.*[706]

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par l'auteur du traité des obligations. Nouvelle édition revue & corrigée. Dabure pere, 1772. Part IV, § 307, pp. 315-136: “Plusieurs modernes qui ont traité du Droit naturel, du nombre desquels font Pufendorf, Barbeyrac, &c, ont cru que les Jurisconsultes Romains s’étoient, écartes fur cette matière des vrais principes du Droit naturel, & ils soutiennent au contraire que la chose venue est au risque du vendeur, tant qu’il en demeure propriétaire ; que c’est sur lui que doit tomber la perte que arrive de cette chose, quoique fans sa saure ; pourvu que l’acheteur n’ait pas été en demeure de la recevoir ; & pareillement que c’est lui qui doit profiter des accroissements qui surviendraient dans la chose venue. Leurs arguments font, 1°. que c’est une maxime reconnue par les Jurisconsultes Romains eux-mêmes, qu’une chose est aux risques du propriétaire, res perit domino. »

[705] Buckland, William Warwick. “Casus and frustration in Roman and Common Law.” *Harv. L. Rev.*, vol. 46, 1932, p. 1281.

[706] Buckland, p. 1287.

The distinction is pertinent since, in the coronation cases, Pothier became the authority invoked for reasons Buckland clarified[707]:

> *"[I]n Krell v. Henry is Pothier, whose system is different from both the Roman and the PandectistIn 1802, in his great work on Obligations, systematizing developments in France, Pothier produced a unitary system of contract with the distinctions between stricti iuris and bonae fidei transactions suppressed, and a set of rules constructed by choosing what seemed to him good from both Roman systems. He laid it down that casus released both parties absolutely. For Roman law that is misleading, at least if applied to mutual undertakings. It is not true for sale, and if the rules of hire give, at first sight, something like that result, this is due not to any doctrine of casus, but to the notion of bona fides. Pothier does not advert to the difficulties where one or more parties to the contract may have incurred expense, which really underlie the English decisions."*[708]

Buckland raises the issue of what happens if one party is released due to casus, particularly when the contract is bilateral (most business relations are), where there are mutual obligations between parties. If nothing has been done on either side yet, must the other party still perform? There is no clear answer to his understanding of Roman law texts providing a solution. If a promise was made initially without reason, or if the reason for promising was finished or did not occur, then the action for recovery does not apply. Nevertheless, Buckland cautions against conflating this with the release by *casus*. Due to unforeseen circumstances, the non-performance rule would not apply to release parties. According to the texts, the other party would still be bound, and there was no equitable release by exception of fraud (*exceptio doli*). The release was purely for the party who could not perform, with no further implications.

The reasoning developed by Buckland will significantly influence decrypting how jurisdictions approach the issue since unforeseen circumstances frustrating contracts generally affect one party with greater intensity than the other. Consequently, the problem is why, instead

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[707] Specially in Pothier's "A Treatise on Obligations: Considered in a Moral and Legal View", Martin & Ogden, 1802, p. III, cap. VI, § 613, p. 121: "There cannot be a debt without something due, which may be the subject and object of the obligation. From this, it follows that when the thing which was due comes to perish, as there no longer remains anything which may be the subject and object of the obligation, there can no longer be an obligation. The extinction of the thing due necessarily therefore carries the extinction of the obligation."

[708] Buckland, p. 1293.

of releasing both parties, the courts must evaluate shifting losses or reexamine the conditions of the original agreements. If one reads all the unforeseen circumstances cases closely, the problem yields as to what extent courts should replace parties' will, or once that role is performed, what is the just benchmark of justice that does not further harms the other. As the system evolved, it can be observed that instead of collapsing conflicting principles, courts tended to dedicate more attention to evidence, relying on police making for the situation that caused the imbalance or bestowing the parties the role of rediscussing the terms that led to the disparity.

While commenting on how the exception in Taylor v. Caldwell became the rule Catharine Macmillan brings to attention how courts developed a new rule of law, shedding light on how courts used historical and Roman Law sources to provide a justification that seemed more according to higher principles of Law, discharging the defendant to paying damages if the disappearance of the hall was caused by circumstances outside defendant's will and behavior. The jurisprudential evolution transpired within courtrooms as global events accelerated more, and the doctrine was largely used during the First World War. She correctly asserts:

> *"From a judicial perspective, this fictitious device allowed courts to impose a rule of law while appearing to do so on the grounds of the parties' intentions. The device had the advantage of allowing a contract to be discharged not only in the face of a subsequent impossibility, but also in the face of radically changed circumstances which left performance possible, but without the purpose the parties had intended. It also included situations in which the adventure was frustrated; primarily shipping cases where the event so disrupted the schedule of the contract that its purpose was lost. The broadness of this device allowed many different events to be swept up under the new rubric of 'impossibility' or 'frustration'. In this process, Blackburn J's implied condition device became a doctrine. As McElroy noted, it was the application of the case to the 'Coronation Cases' and to the numerous cases that arose from the massive disruption of commercial activities brought about by the First World War that extended the doctrine enormously. By 1920, Scrutton LJ remarked that the numerous cases decided on this new exception had made a 'serious breach in the ancient proposition' of Paradine v. Jane. The exception had to dominate the rule."*[709]

[709] MacMillan, Catharine. "Taylor v. Caldwell." *Landmark cases in the Law of Contract*, ed. By Charles Mitchell and Paul Mitchell. Hart Publishing, 2008, pp. 167-203. pp. 202-203.

Civil Law jurisdictions, including Germany, France, and Italy, have embedded variations of the *rebus sic stantibus* principle within their civil codes. In Germany, Section 313 of the German Civil Code (Bürgerliches Gesetzbuch, BGB) acknowledges unforeseen changes in circumstances and allows contractual modification if enforcing the initial terms would be unconscionable. In a similar vein, Article 6:258 of the Dutch Civil Code acknowledges the principle of "unforeseen circumstances" (*onvoorziene omstandigheden*) as a ground for contract modification or dissolution.

At the level of International Law[710], Article 62 of the Vienna Convention on the Law of Treaties (1969) recognizes r*ebus sic stantibus* as "Fundamental Change of Circumstances." However, its application is tightly circumscribed, allowing treaty termination or withdrawal only when the altered circumstances constituted an essential basis of the parties consent to the treaty.

Despite these legal mechanisms, some jurisdictions lack well-defined solutions to navigate this tension. Strict adherents to *pacta sunt servanda*, such as some common law jurisdictions, could arguably be deficient in comprehensively addressing this interplay due to the relative rigidity and narrow applicability of doctrines like "frustration of purpose".

Thus, the interplay between pacta sunt servanda and *rebus sic stantibus across* jurisdictions illustrates a fascinating legal landscape driven by statutory provisions and case law and shaped by an enduring negotiation between contractual stability and adaptability to changing circumstances.

The German compromise between conflicting values on contractual Law is present in BGB's § 241, which establishes the obligations arising from contracts are indeed binding and must be upheld. The absoluteness of this principle is mitigated in ways providing for situations

[710] Paddeu, Federica I. "A Genealogy of Force Majeure in International Law." *The British Year Book of International Law*, vol. 82, no. 1, 2012, p. 381.

where contractual obligations can be modified or dissolved, such as § 275 BGB[711], a party is not obligated to perform a service if it is impossible. Perfomance can also become impossible (*Wegfall der Geschäftsgrundlage*[712]) by invoking the doctrine of frustration of contract, or "Störung der Geschäftsgrundlage," under § 313 BGB, allowing for a contract to be adjusted or even terminated if circumstances fundamental to the contract have changed significantly. Finally, consumer law protection also constitutes a shield to the strict obedience to the application of "pacta sunt servanda." For example, certain contracts can be revoked within a specific period under §§ 355-357 BGB.

To enumerate the two most prestigious civil codifications, the French system in Article 1103 establishes that legally-formed contracts have the force of Law for those who have made them. But, despite the importance of "pacta sunt servanda," there are provisions in French Law that can mitigate or limit this principle by invoking the impossibility of perfomance on article 1219, in which a party may refuse to perform its obligation, even if it is due if the other party does not perform its own and if this performance is not guaranteed. Additionally, the venue for claiming imprévision, the revised article 1195 of the French Civil Code to not fall behind continental European counterparts[713], offered a renewed provision for unforeseeable change of circumstances at the time of the conclusion of the contract, making performance excessively onerous for a party who had not accepted the risk of such a change, that party may request a

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[711] For the doctrine of Unmöglichkeit see Wollschläger, Christian. *Die Entstehung der Unmöglichkeitskehre*. Böhlau-Verlag, 1970. p.7.

[712] For the introducer of the theory in Germany, amidst the problems originated from war, Oertmann, Paul. Die Geschäftsgrundlage: ein neuer Rechtsbegriff. Scholl, 1921, p. 4: „Dar führt zu dem entscheidenden Punkt: sind die Kondiktionen des Römischen, die ihnen entsprechenden Bereicherungsansprüche des deutschen Bürgerlichen Rechts wirklich, überhaupt oder auch nur teilweise, aus dem Gesichtspunkt der mangelnden Voraussetzung zu erklären? Windscheid hat sie als Hauptbelegstücke für seinen Begriff verwertet, und wohl seine sämtlichen ganzen oder halben Anhänger sind ihm darin gefolgt.“

[713] For the importance of the French reform on multiple dynamics of the law of contracts, as it will be later addressed, see Chénedé, François. *Le Nouveau Droit des Obligations et des Contrats*. Dalloz, 2018. pp. 125-153. pp. 115-116: “La réforme a été l’occasion d’une réouverture de de débat classique du droit des contrats : le législateur devait-il consacrer ou abandonner la jurisprudence Canal de Craponne ? Si une parte de la doctrine n’a pas manqué de rappeler la vertu politique et la réussite pratique de ce renvoi à la responsabilité des parties, d’autres auteurs ont relevé que différents droit étrangers avaient la voie de la révision pour imprévision sans remettre en causa la sécurité des échanges contractuels. »

renegotiation of the contract from his co-contractor. Provisions protecting consumers are also adopted as a policy since, for parties' asymmetries, it can be assumed that one of the sides is in a position to exploit the other vulnerability[714].

During the covid-19 pandemic, the French Reform had the chance to be tested against unforeseen events and compared with other jurisdictions' provisions on how to deal with those contingencies[715].

That brief overview, which will be developed in the following paragraphs, surfaces the controlling principles for obeying and breaking promises[716], and it is undeniable that they all rely on vanishing solidarity among the participants on the social matrix. The erosion of mechanical solidarity created an array of issues in which principles battle around the lack of a core, a primary value regarding a group's cohesion.

With closer observation, one might conclude that this calibration performed by adjudicatory bodies is not as different as Alexy's proportionality ponderation of fundamental principles since, as a last resort, contract law deals with basic principles of freedom to private enterprise not protected in a constitutional level, but by the rules the systems provides bellow constitutional rights of freedom[717]. The deference granted to good faith and equity when

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[714] For consumers' vulnerability exploitation see Radin, Margaret Jane. *Boilerplate: The fine print, vanishing rights, and the rule of law*. Princeton University Press, 2013.

[715] Dubarry, Julien. « Baux commerciaux et Covid-19 : un éclairage de droit allemand sur le principe et la mise en œuvre de la révision des loyers pour imprévision. » *RDC (Revue des Contrats)*, vol. 4, 2022, pp. 82-90.

[716] MacNeil, Ian R. "The many futures of contracts." *S. Cal. l. Rev.*, vol. 47, 1973. p. 726: "Try as we will we cannot make the future the present. Even the simplest and clearest promise, supported by conditions most conducive to its performance and backed by the most intense social, economic and legal pressure for performance, is not, at the instant it is made, the same thing as its actual performance in the future."

[717] Alexy, Robert. *A theory of constitutional rights*. Oxford University Press, 2010. p. 221: "The 1974 decision of the Federal Constitutional Court on the right to terminate contracts for the lease of accommodation should be interpreted in just this way. The Court starts form a conflict of principles. It states that the legislature 'in the context of private law according to article 14(1)(2) Basic Law…must take equal account of both dialectically related elements of the Basic Law of constitutionally guaranteed liberty and the requirement of a socially fair order of property. It must bring the interests of all parties which are worthy of protection into a fair balance and a balanced relationship.' This is a clear description of a conflict of principles. It is said of the 'removal of the so-called alteration-termination- that 'to a certain extent [it] limits the landlord's freedom of action' but that 'in the light of the high significance of the home to the individual and the family it is justified by article 14(2) Basic Law'. This expresses the result of a balancing process which leads to a limitation. Admittedly, the Court talks in terms of a limitation of general freedom of action and not the constitutional right to property. But the limitation of freedom of action occurred through a removal of a private law power,

confronted with the sanctity of contracts will be prioritized depending on several factors: the jurisdiction in which a case is adjudicated as well as the adjudicatory body deciding a case, the power of the party claiming relief under exceptional clauses, the political decision in a given moment on what sides of the dispute are deserving protection. Whereas conflicts presented in periods of normality tend to receive a treatment compatible with the juridical order in place when the whole social matrix is under stress, the predictable outcome is to reappraise all contracts and transactions entered before the unforeseen events happen.

III.II. Living in a dream world

Reflecting on the genesis of exceptions to impossibility and their subsequent replacement by the more encompassing term "frustration," Grant Gilmore casts his observations from a premise that insists "it is never impossible to pay money". He continues:

> *"'Frustration' presupposed a two-way rule of discharge – applicable both to parties who pay and to parties who do – and indeed the Coronation cases, from which the 'frustration' usage seems to have emerged, involved the discharge of paying parties, that is, people who had engaged rooms from which to view the procession that never took place. But if parties who pay are to be discharged for something less than 'objective impossibility', then, it would seem to follow, parties who do should equally be discharged for something less than 'objective impossibility'. Then, it would seem to follow, parties who do should equally be discharged for something less. And so they were. In time the liberalization of excuse under frustration theory reflected itself in a corresponding liberalization of excuse for mistake. 'Mistake' and 'frustration,' it was pointed out, are merely two different ways of talking about the same thing – that is, the real world has in some way failed to correspond with the imaginary world hypothesized by the parties to the contract. That there has been such a liberalization of excuse, under various theories, which has been going on for the past half century, is not longer seriously disputed by anyone, although there are stern moralists who feel that this is an unfortunate trend which should, if possible, be reversed."*[718]

Gilmore alludes to Harold Berman's skepticism while addressing the adoption of a theory of mistake, frustration impossibility, and so forth. As Berman points out, the ambiguities of assuming a necessarily weak and disadvantaged side in need of a juridical protection that bypasses some contractual premises can be misleading with the contract dealt with is not taken

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to which the principle of private property gave a prima facie right. The removal of the alteration-termination is thus to be seen not as mere outworking but as a limitation."

[718] Gilmore, Grant. *The Death of Contract*. 1974. p. 81.

into consideration[719]. According to Berman, a party's impairment does not necessarily correspond to a position of weakness or disadvantage, especially while dealing with international sales contracts in which the risks were extensively assessed and the parties were aware of the burden of risks allocated on each side.

To create the correlation between mistakes and frustration, Gilmore established a known distinction between the subjective and objective impossibility of perfomance. If, for objective impossibility, parties are discharged, it follows suit that, for the less - mistake – discharge should also be an option. Such vision reinforces Gilmore's argument that the erosion of contracts and, therefore, promises were widespread across contractual excuses.

Berman's viewpoint presents a cautionary tale against the liberal application of frustration theories in contract discharges. He questions the necessity of such doctrines, especially in international trade, where parties are typically best suited to dictate contractual terms. The reappearance of the clausula rebus sic stantibus, previously phased out from juridical use, is seen as potentially disruptive. This is even more pertinent in complex commercial transactions where contracts are meticulously designed, detailing risk allocations and specific terms. Berman warns of the doctrine's potential misuse, enabling an imprudent or deceitful obligor to evade their obligations and burdening the innocent obligee with lost benefits and possible liabilities. He deploys Suez's case as an illustration of the uses of theories of frustration to discharge a contract and contends that a set of excuses theories are unnecessary since the same results could be achieved without relying upon frustration doctrines. He attributed this to tendencies that would ultimately:

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[719] Berman, Harold J. "Excuse for Nonperformance in the Light of Contract Practices in International Trade." *Columbia Law Review*, vol. 63, no. 8, 1963, pp. 1413-1439. p. 1416: "Stated thus in broad terms, as a matter of "general contract law," this argument has considerable appeal. It is elementary that contract law as a whole has the function not only of enforcing the parties' manifested intentions but also of providing a just solution for problems that the parties failed to foresee or that they foresaw but left open. Yet this general proposition is quite misleading when put in the form of rules or doctrines to be applied indiscriminately to all types of contracts."

> *"have an unfortunate multiplier effect if the courts apply a liberal theory of excuse, devised for situations in which the parties have in fact not contemplated the risk of nonperformance due to the occurrence of abnormal events, to contracts drawn for sophisticated commercial transac tions in which clauses concerning such risk are drafted with care. The draftsman must take into account the theory that has been adopted by the courts for cases in which neither contract nor custom can provide an answer; but the courts must also shape their doctrine to the contract and the custom. Otherwise the doctrine will become a convenient trap-door through which the imprudent or unscrupulous obligor can escape, leaving the innocent obligee to bear not only the loss of expected benefits but also, in many cases, the burden of liability to subpurchasers."*[720]

However, aside from the strong arguments in favor of discouraging the court's interference in conflicting jurisdictional rules, contracts highly governed by parties in an international trade environment manifest the effects Ian Macneil attributed to relational contracts' bureaucratization. Parties no longer rely on states' legal framework, replacing it with their own governing rules.

Within the discussion of crafting exceptional clauses that soften the rigorous application of the "pacta sunt servanda" principle, there's an implicit acknowledgment of Hume's is-ought gap[721]. This distortion arises from the discrepancy between the observed reality of contractual events, replete with unforeseen circumstances that parties could never forecast, and the developments from such agreements, legislators and adjudicatory bodies build a set of moral grounds to govern such events. In its turn, those enacted rules imply a pattern of moral behavior assumed to govern parties as they are performing obligations. Those legally enacted commands encompass good faith, the duty to mitigate losses, the prohibition of unjust enrichment, and, more recently, the duty to inflict impoverishment.

Scholars of the Natural Law School have been particularly focused on navigating this gap. They viewed the is-ought dilemma as a fundamental challenge to strike a balance between the binding nature of promises and the necessity to adjust these promises under certain

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[720] Berman, p. 1437.

[721] Van Klink, Bart; Lembcke, Oliver W. "Exploring the boundaries of law: On the Is–Ought distinction in Jellinek and Kelsen." *Facts and Norms in Law*. Edward Elgar Publishing, 2016. pp. 201-223: "Kelsen argues that the phenomenon of law can be studied from two different perspectives: either how it ought to be (Sollen) or how it is (Sein). These two perspectives correspond with two different disciplines from which law can be studied: respectively, a normative science of law that establishes deductively which rules are valid, and an explanatory sociology of law that determines inductively a certain regularity for which it tries to find a causal explanation." Kelsen, Hans. *General Theory of Law and State*. Translation Eng. Anders Wedberg. Harvard University Press, 1949. xiv: The legal order determines what the conduct of men ought to be. It is a system of norms, a normative order. The behavior of the individuals as it actually is, is determined by laws of nature according to the principle of causality. This is natural reality. And in so far as sociology deals with the reality as, determined by laws of nature according to the principle of causality. This is natural reality. And in so far as sociology deals with this reality as determined by causal laws."

conditions without undermining the foundational principle of mutual consent sustaining agreements. On Grotius commentary on this matter[722]:

> *"The assent of the wise is to be added; for as jurists claim that nothing is as natural as the validation of an owner's will to transfer his property to another, so it is declared that nothing aligns more with the mutual trust of mankind than the fulfillment of agreements made amongst them... Paulus posits that a debt is owed to us, under the law of nations, when we expect it in good faith. Here, 'ought' suggests a certain moral obligation. We cannot accept Connanus's argument that we only rely on good faith when action aligns with a promise. Paulus was discussing an action to reclaim what has been paid but is not due, which becomes moot if the money is paid under any kind of agreement: for then, even before any action (re adhuc integra), it should be paid by Natural Law and the law of nations, even if the Civil Law did not intervene to prevent potential disputes [by ending the action after it has been paid]."*

This assertion proves that natural scholars were aware on the importance of transcending the gap, since the ought gap was perceived a fundamental issue to overcome fundamental, a dilemma on how to transcend the binding nature of a promise, when necessary, without inflicting harm on the nascent theory of agreements sustained by mutual consent.

Grotius's stressed how much the theory enshrined the moral obligations inherent within it, which go beyond mere contractual stipulations. He identified principles of good faith, natural law, and the law of nations as binding factors, establishing a moral necessity in contractual relationships. His approach became timeless in bridging the gap between reality and the "ought," particularly when unexpected events interfere with the fulfillment of a contract.

This aspect will again gain relevance since the moral grounds for shifting risks of an enterprise constitute the core of approaching the exceptions to the pacta principle. Since harm may result from unfulfilled promises, one cannot infer the moral obligation to create commands that reclaim their juridical force from real nature events. However, it is also untenable to generate such norms solely from abstract concepts, no matter how ideally constructed they may be. If laws do not serve as effective mechanisms to maintain societal peace and order, they risk

[722] ‘"On the Rights of War and Peace" (tr. William Whewell, 1853, Book II, Chapter XI, I.IV, p. 147).

being sidelined in favor of self-help solutions. Hence, the question of who decides the risk bearer — the judge or another authority — becomes an issue of fundamental significance[723].

An insight supported by behavioral economics comes from what Aaron Wright defines heuristics. Individuals constantly make use of mental short cuts to facilitate decision-making processes. Excessive optimism, disregard for disadvantageous outcomes, irrationality on pondering all the possible ingredients in each situation constitutes cognitive tools to make decisions possible. But the facilitation inevitably comes with a downturn, courts granting relief to cognitively biased individuals. Furthermore, it is unknown whether the bias was purportedly embraced because, in any case, parties would be shielded by their evil intent in an eventual unforeseen occurrence. Ultimately, corporations seek as their final goal the maximization of profits, disregarding the objective and subjective reasons for sustaining a promise. As a solution for the impracticability doctrine, Wright provides an equation synthesized under the following assertion: "*In other words, a given risk will be foreseeable if the transaction costs associated with determining the risk and magnitude of a given event is less than or equal to the product of the event's probability and magnitude*."[724]

Even while confronting Roman Law precepts in sources such as the Digest, one faces how rudimentary the avenues for assessing mental states and the reason why parties relied on formalities, protocols, and formulas; legal systems of Western tradition never detached its validation from those very sources. Given that it constituted a long process marked by several turns in divergent directions, making those systems a product of extreme sophistication.

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[723] Friedmann, W. *Law in a Changing Society*. Stevens & Sons Limited, 1959. p. 115: "Such a rationalization can, however, only serve as the framework within which courts, guided by the intensity of the upheaval will supplement, modify or supersede the intentions of the parties expressed at the time of the making of the contract. Despite such judicial emphasis on pacta sunt servanda and other traditional aspects of contract, the character of contract as a legal instrument of contemporary society is undergoing profound changes, in which elements of the old mingle with the new. The normal commercial contract – between individuals or corporate persons – can still be handled with the traditional categories and approaches. But whenever elements of public policy enter into the making of a contract, either through the status of one or both of the parties, or through the terms of the contract itself, the policy aspects of contract increase."

[724] Wright, Aaron J. "Rendered impracticable: Behavioral economics and the impracticability doctrine." *CARDozo L. REv.*, vol. 26, 2004, p. 2194.

Even lacking the scientific discoveries of mental processes, binding someone by their promises could still be possible. As Zimmermann reconstructs, as much as Gordley, to point out a few names that assembled the very intricate puzzle object of the present study, the scholastic doctrine of causation paved the way for the entire contractual doctrine that would follow, in Zimmerman words:

> *"According to St. Thomas, and ultimately, Aristotle), there are four kinds of causes: formalis, materialis, efficiens, and finalis. Obviously, it was attractive, particularly for the canon lawyers and the commentators, to apply this scheme to the Law of contracts and thus to extend the concept of causa as they found it in the Corpus Juris Civilis. If everything is based on a cause, so must contracts be. Baldus appears to have been the first to draw the consequences."*[725]

From causa's original formation arose Grotius and Pufendorf's understanding of natural laws received in different legal environments. Domat and Pothier were carried to the Civil Code in France, and the German doctrine faded the theory to invisibility[726]. But Zimmermann alludes causa constitutes the missing piece of garment to compose a patchwork covering binding promises for the future.

The pandemic has underscored an increasing convergence between the interpretative methods of Private and Public Law, wherein the lines of demarcation have become as indistinct as ever. Consequently, and not for any other reason, doctrinal suggestions arose in the sense that it became necessary to weigh and balance disparate

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[725] Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford University Press, 1996. p. 551.

[726] Todescan, Franco. *Le radici teologiche del giusnaturalismo laico: II, il problema della secolarizzazione nel pensiero giuridico di Jean Domat*. Giuffrè editore. p. 18: "La prefazione alle Loix civiles si ispira in definitiva a una duplice esigenza e tradisce la compresenza di due linee di pensiero: l'una matematistica, l'altra teologica. Se da un lato traduce l'aspirazione a uguagliare, nella giurisprudenza, il modello delle discipline scientifiche, d'altro lato – in sintonia con il metodo propugnato dall'Augustinus – si riafferma la necessità di ancorarsi saldamente all'autorità della tradizione. Per Domat il principio di autorità conserva importanza in un settore, come quello giuridico, che verte sullo studio delle norme divine e umane; tuttavia, solo in parte il giurista finisce per coincidere con la metodologia giansenista. La separazione fra filosofia e teologia, avanzata da Giansenio, non verrà condivisa fino in fondo dall'autore di Clermont, che tenderà piuttosto ad istaurare una vigorosa coniugazione tra premesse teologiche e metodo matematizzante."

values to find a compromising solution rather than resolve the antinomy within the system itself.

At instances of appellate cases that surfaced the juridical scenarios during the pandemic, some became object of attention as source of valuable comparisons between the multiple solutions offered in different jurisdictions[727]. In light of Art. 1195 of the French Civil Code

[727] Dubarry, Julien. « Baux commerciaux et Covid-19 : un éclairage de droit allemand sur le principe et la mise en œuvre de la révision des loyers pour imprévision. » *RDC (Revue des Contrats)*, vol. 4, 2022, pp. 82-90. The author makes an express reference to the reasoning used by the German federal court of justice in the sense that, even though it recognized that various measures taken to combat the pandemic affected the legal basis of the act. However, paradoxically, the court acknowledged that the loss of the objective basis of the business did not necessarily imply the admission of a contract review, as this reason alone is insufficient. In such a situation, it is required to check whether the parties were able to meet the agreed contractual conditions. The decision of the lower court was reviewed and sent back to verify the concrete economic effects of the case, rather than promptly dividing the risks of the unforeseen event. In this sense p. 84 : «Les nombreuses mesures prises pour combattre la pandémie de Covid-19 affectent en l'espèce le fondement juridique de l'acte au sens large [große Geschäftsgrundlage, nous précisons]. Par cette expression, on comprend l'attente des parties au contrat que les conditions économiques, politiques et sociales fondamentales d'un contrat ne changent pas, notamment par une révolution, une guerre, un déplacement forcé de population, une hyperinflation ou une catastrophe (naturelle), et que l'existence sociale ne soit pas menacée. » p. 87 : « Dans ces circonstances, il faut se demander si, et les cas échéant en quoi, la décision rapportée peut éclairer l'application d'article 1195 du Code civil. Ne pouvant comparer que ce qui est comparable, le point de départ du raisonnement doit être la juxtaposition des conditions posées par l'article 1195 du Code Civil d'une part, et le § 313 BGB d'autre part. Schématiquement, deux conditions sont communes et la troisième diffère. Les conditions communes sont, d'une part, l'existence d'un changement de circonstances et, d'autre part, l'absence d'assomption du risque de ce changement par l'une des parties. Au titre de la divergence, la condition française d'excessive onérosité s'oppose à la condition allemande d'impossibilité d'exiger du cocontractant qu'il soit tenu par les termes initiaux du contrat. En vérité, cette divergence n'est pas indépassable si on considère que la circonstance que l'exécution du contrat devient excessivement onéreuse rend intolérable d'imposer au cocontractant qu'il reste tenu dans les termes initiaux de la convention. Les conditions de la disposition française se fondraient ainsi dans le domaine de la disposition allemande, qui serait néanmoins plus large puisqu'allant au-delà de l'excessive onérosité. La motivation allemande peut être un éclairage d'autant plus intéressant pour le juriste français qu'on se trouve dans le périmètre du dénominateur commun aux deux décisions. » The decision offers an unexpectedly conservative interpretation of § 313 of the German Civil Code, concerning the adaptability of contracts amid changing circumstances. The Court sets a high bar for altering contractual conditions, asserting that not every significant shift justifies such adjustments or termination. It insists that alterations can be justified only when adherence to the initial agreement results in an untenable outcome for the involved party - given all considerations, including contractual or legal risk distribution. The decisions remanded to the lower Court the need for collecting further evidence on the real costs born for each party on the frustration due to the pandemic, a rather striking rigorous defense of contractual stability over adaptability. For a direct reasoning of the judgement see Federal Court of Justice, Bundesgerichtshof (BGH), XII ZR 8/21, 12.01.2022, Federal Court of Justice, Communication from the press office (Pressemitteilung) No. 4/2022, Judgment of January 12, 2022 – XII ZR 8/21, p. 24 [53]: "Allein der Wegfall der Geschäftsgrundlage gem. § 313 Abs. 1 BGB berechtigt jedoch noch nicht zu einer Vertragsanpassung. Vielmehr verlangt die Vorschrift als weitere Voraussetzung, dass dem betroffenen Vertragspartner unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann. Durch diese Formulierung kommt zum Ausdruck, dass nicht jede einschneidende Veränderung der bei Vertragsschluss be- stehenden oder gemeinsam erwarteten Verhältnisse eine Vertragsanpassung oder eine Kündigung (§ 313 Abs. 3 BGB) rechtfertigt. Hierfür ist vielmehr erforderlich, dass ein Festhalten an der vereinbarten Regelung für die betroffene Partei zu einem nicht mehr tragbaren Ergebnis führt (Senatsbeschluss vom 3. Dezember 2014 - XII ZB 181/13 - FamRZ 2015, 393 Rn. 19 mwN; BGH Urteil vom 1. Februar 2012 - VIII ZR 307/10 - NJW 2012, 1718 Rn. 30 mwN). Deshalb kommt eine Vertragsanpassung zugunsten des Mieters jedenfalls dann nicht in Betracht, wenn ihm ein

proposed harmonizing conflicting values, instead of making one value prevail against another since the idea that Private Law is the only controlling discipline regulating disputes that extravasates private agreements proved faulty. The covid-19 pandemic proved to be an unprecedented way of transferring wealth, as never witnessed before, and contractual tools as means to enable the transfer were highly deployed to shift the risks either to the weaker parties or to the government as the natural universal insurer.

As the doctrine produced during the pandemic demonstrates:

> *"Force majeure and hardship provide legal tools to deal with the effect of unexpected future events and unforeseen changes in circumstances, particularly in long-term contracts.[...] Based on this historic and comparative analysis, the paper shows that in such extraordinary times, the doctrines of force majeure and hardship assume the role of regular, rather than exceptional legal remedies, allowing for the risks emanating from the unprecedented crisis to be evenly distributed between the players in the global economy."*[728]

This part of the current investigation sheds light on the utmost device of contractual "suspension of the private agreement,"[729] the exception to contract. As an argument that constitutes part of the canon contractual law, it also threats the premises in which the discipline was entrenched[730]. The delicate balance is deeply rooted in the dynamic interplay of

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unverändertes Festhalten an der vertraglich vereinbarten Miethöhe unter Abwägung aller Umstände einschließlich der vertraglichen Risikoverteilung zumutbar ist (vgl. BGH Urteil vom 11. Dezember 2019 - VIII ZR 234/18 - NJW-RR 2020, 523 Rn. 20 ff.)"

[728] Berger, Klaus Peter; Behn, Daniel. "Force majeure and hardship in the age of corona: a historical and comparative study." *McGill J. Disp. Resol.*, vol. 6, 2019, p. 76.

[729] **Trietel, Guenter. *Frustration and Force Majeure*. Thomson Sweet & Maxwell, 1-001,** p. 1: "The first is the principle of sanctity of contract, sometimes expressed in the Latin maxim pacta sunt servanda. This principle insists on the literal performance of one party, or reduced its value to the other, it is based on the view that one of the main purposes of contract as a legal and commercial institution is precisely to allocate the risks of such events. It takes the position that, once those risks have been so allocated by the parties they should not, as a general rule, be re-allocated in a different manner by the courts. On the other hand, the principle of sanctity of contract, like many legal principles, is not considered to express an absolute value. It is qualified by a counter-principle that parties who enter into contracts often do so on the basis of certain shared, but unexpressed assumptions. This counter-principle is also sometimes expressed in a Latin phrase, rebus sic stantibus. Its effect is that contractual obligations may be discharged by supervening events where these have brought about a change of circumstances so significant as to destroy a basic assumption which the parties had made when they entered into the contract."

[730] Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Oxford University Press, 1996. p. 581: "The 17th century was flowering time for the clausula doctrine (partly, perhaps, in response to the devastating wars of the time) and it became part and parcel of the usus modernus as well as of the systematic endeavors of the natural lawyers. It attained great prominence in the field of public international law, but in the area of private law its star ultimately began to wane. Nineteenth-century legal

expectations: contracting parties look to the State to preserve their agreements, underscoring the primacy of the p*acta sunt servanda* principle (agreements must be kept)[731].

An isolated analysis of those exception categories does not provide a clear, encompassed vision of the phenomena. However, once taken together, it becomes evident how pervasive they are in the system. The approach to frustration in the English system, of Good Faith in the German justifying the application of the "*Wegfall der Geschäftsgrundlage*," or of imprévision and force majeure in the French, and impracticality in the American, to cite a few, provide a broader picture of how in every decision taken on whether or not a contract must be performed there is the opposite dichotomy on if it should be exempted. This panorama assumes a sharper contour while approaching international sales bodies of laws and principles and the corresponding convention, CISG, that contains a provision decisive to guide national jurisdictions on the problem of dealing with the unexpected.

While national jurisdictions have the advantage of crafting their institutions according to the juridical *mentalité*, on the international framework, the competing views on the right approach require nailing the language and reach of those provisions in such a way that the system achieves a level of highly detailed and articulated definition that national jurisdictions tend to reabsorb those as their crafts.

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science was predominately hostile to it, and the clausula this disappeared. But the underlying idea had only temporarily lost its attraction. Thrown out by the door, as Windscheid put it, it will always reenter through the window. The will of a person usually related to a certain given set of facts only; it has been formed on the basis of certain suppositions. If these turn out to be wrong, it is not fair to hold that person by his word."

731 Lutzi, Tobias. "Introducing imprévision into French Contract Law - a paradigm shift in Comparative Perspective." *French Contract Law Reform: a source of Inspiration?* Edited by S. Stijns and S. Jansen. Intersentia, 2016, pp. 89-112. pp. 90-91: "Marking the transition from Roman Law, where only some forms of promises (*contractus*) were actionable while others (pacta nuda) were not, to the medieval canonists who claimed that (nonetheless) all promises must be kept, the principle of *pacta sunt servanda* is rightly considered as an essential ingredient to private autonomy and a cornerstone of virtually all European systems of contract law. It is enshrined in Art. 1134, al 1, of the French Civil Code, § 241 of the German *Bürgerliches Gesetzbuch* (BGB), and was authoritatively stated for English law in 1647.11 Pufendorf described it as 'a most Sacred Command of the Law of Nature and what guides and governs not only the whole Method and Order but the whole Grace and Ornament of Human Life, that every Man keeps his faith, or which amounts to the same that he fulfils his Contracts, and discharges his Promises'."

As often happens when jurisdictions dialogue, they change to exchange legal experience, and with that change. When the Court Cassation decided *Canal de Craponne* case in 1876, it provided very rigid grounds for controlling the fairness of price stipulation, even after 300 years of the contractual relationship. The case dealt with the right to increment obsolete prices when they were not corrected after centuries. The Court ignoring the effect times plays in contractual relationships, denied the right to revise prices. As one might guess, such a strict application on the right to adjust prices fixed on contractual stipulations embraced with the 2016 reform was overhauled to synchronize the solidity of parties' wills with a more flexible vision on revision, allowing for modification when the requirements *extériorité*, *imprévisibilité, a*nd imprévisibilité are fulfilled. Those elements must situate the event beyond the party's control and could not reasonably have been foreseen at the time of the conclusion of the contract. Besides, the effects of the event could not be avoided by appropriate measures.[732]

On the other hand, the absence of a solid procedural or dynamical processing of those clauses in the international arena requires the decision bodies to adhere to the substantive side of the dispute, which improves the demarcation of those institutions from the evidentiary and procedural defensive aspect. To give one example of how it operates, on how intermingled those branches of Law are while dealing with international contracts, the requirement of notifying the other party as soon as the party learns of the breach of contract constitutes evidence that the command promptly takes care of preparing accurate evidence for the

[732] Kovac, Mitja; Poncibò, Cristina. "Towards a Theory of Imprévision in the EU?" *European Review of Contract Law*, vol. 14, no. 4, 2018, pp. 344-373. p. 346: "Specifically,we discuss two main research questions with the aim of considering recent developments in the field.First,we question whether the theory of 'imprévision' remains a mere exception, or whether is it possible to argue that, by considering the latest developments, it may represent a 'newparadigm', or in other words,'anautonomous theory'. We argue that change of circumstances is anautonomous concept with respect to other concepts, suchas, for example, impossibility in Germany, Italy and now in France. Second,we examine the conceptual framework of such a theory, by briefly reconstructing its'shifting' foundations and clarifying the complex interference of different legal concepts that a reapplied to cases involving unexpected circumstances: contract interpretation, presupposition, goodfaith, fairness and solidarity." Delvolvé, Jean-Louis. « L'imprévision dans les contrats internationaux. » *Travaux du Comité français de droit international privé*, vol. 9, no. 1988, 1991, pp. 147-170.

decision-maker. Indeed, article 79, section 4 provides: "*(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.*"

The official translated version of article 313 of the BGB provides the following: "*(1) If circumstances that became the basis of a contract have undergone serious change since the contract was concluded and if the parties would not have concluded the contract or would have concluded it with different contents had they foreseen this change, then adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be required to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or if one party cannot reasonably be required to accept it, then the disadvantaged party may rescind the contract. In the case of continuing obligations, the right to terminate takes the place of the right of rescission." German Civil Code BGB* (2023)[733].

At first glance, the parallel may seem similar, but the ends and the mode in which the German version operates significantly differ. Tobias Lutzi [734] offered a rich historical account while approaching the German doctrine of the basis of the transaction. As a more recent model, incorporated in the Code in 2002, the doctrine is more concerned with an adequate imbalance rather than with the dogmatic nature of the sanctity of contracts as a principle.

[733] At: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1180 (Accessed: 15 June 2023).
[734] Lutzi, p. 100.

The act of exiting the complexities of the elements of contract formation, or development of parties' wills, allows the international zoom-out perspective to divide the patchwork of unexpected circumstances into different categories, as the following example:

> *"When considering the national provisions already existing about the phenomenon, as well as the more recent international and national rules, we will see that that are two main approaches, one centered on the case where performing contractual obligations had become excessively onerous for one party (a situation frequently designated by its French appellation 'imprévision'), and a broader approach which more generally considers situations where the' foundations of the contract' have been destroyed or substantially modified (in German Law, the 'Wegfall der Geschäftsgrundlage') or where the contract has been 'frustrated' (the English law approach). Definitions of the 'hypothesis' in the hardship clauses analysed reflected one approach or the other, under the influence of the Law applicable to the contract." (ICC book, p. 12-13)*

Here it becomes visible that the concern does not regard open or closed clauses or other taxonomies adopted throughout juridical systems.

In international contract law, specific provisions act as a protective measure, providing a fallback in the face of unexpected events that could make fulfilling contractual obligations exceedingly problematic. 2016 UNCITRAL Digest of Case Law delivers a deeper understanding of these provisions since it offers a cross-jurisdictional examination of adversity's threshold that a party must confront to justify invoking such protective clauses.

For instance, the Belgian Court of Cassation interprets the term 'impediment' as outlined in Article 79(1) of the CISG[735], allowing for instances of economic hardship triggered by

[735] See 2016 UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, available at: https://cisg-online.org/search-for-cases/uncitral-digest-on-the-cisg (Accessed: 15 June 2023), p. 374: "A number of decisions have addressed the level of challenge in performing that a party must experience in order to claim exemption under article 79. The Belgian Court of Cassation has indicated that the "impediment" referred to in article 79 (1) CISG may include changed circumstances that have made a party's performance a matter of economic hardship, even if performance has not been rendered literally impossible; the court emphasized that, in order to qualify as an "impediment," the change of circumstances ought not to have been reasonably foreseeable at the time of the conclusion of the contract and performing the contract must involve an extraordinary and disproportionate burden under the circumstances. Several earlier decisions suggested that exemption under article 79 requires satisfaction of something akin to an "impossibility" standard. One decision compared the standard for exemption under article 79 to those for excuse under national legal doctrines of force majeure, economic impossibility, and excessive onerousness—although another decision asserted that article 79 was of a different nature than the domestic Italian hardship doctrine of eccessiva onerosità sopravvenuta. It has also been stated that, where CISG governs a transaction, article 79

altered circumstances, applied even if the contractual execution is not strictly impossible, highlighting that such occurrences should be exceptional, unbalanced, and unpredicted at the moment the contract was established.

However, a differing view held by various other jurisdictions postulates that for exemption under Article 79, an 'impossibility' standard must be met, which constitutes a paralleled standard in national legal concepts such as force majeure, economic impossibility, and excessive burdensomeness. Moreover, it has been highlighted that Article 79 deviates from the domestic Italian hardship doctrine of 'eccessiva onerosità sopravvenuta.' Importantly, Article 79 is considered to supersede and replace analogous national doctrines like 'Wegfall der Geschäftsgrundlage' in German law and 'eccesiva onerosità sopravvenuta' in Italian Law.

Therefore, the differing interpretations of hardship clauses across various legal systems underline the need for a unified approach in international contract law. This unified approach should universally acknowledge the principles of foreseeability, extraordinariness, and proportionality within hardship clauses.

Conversely, the State is expected to exhibit leniency and wisdom when intervening in instances where risks were not accurately assessed, or unforeseen circumstances have arisen since its adjudicatory role in the national order conforms not only with the principles adopted on international treaties but in the harmonization of the Private Law system as a whole. Whereas international arbitration branches are willing to adopt a rationale that better satisfies the interests of the parties involved, not necessarily affined with the consistency of jurisprudential attachment,

The spectrum of perspectives further illuminates the multifaceted nature of contract law. In its judicial capacity, some legal theorists argue that the State should primarily provide

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pre-empts and displaces similar national doctrines such as Wegfall der Geschäftsgrundlage in German Law and eccesiva onerosità sopravvenuta in Italian Law."

a robust framework for contractual enforcement. This view staunchly supports the absolute adherence to contracts and solidifies the State's role as an enforcer. In contrast, others vest the State with Solomon-like wisdom, attributing to it the power to apply a fair measure of justice, thus fostering societal harmony in an all-or-nothing equation[736].

The 'theory of cause' centrally ingrains these contrasting views. It suggests that by assessing the fairness of the 'cause' of the contract, it's possible to ascertain whether an agreement meets the economic needs of the societal context in which it was formed or if a contract was entered into in error in case an inaccurate state of mind produces the mismatch.

To circumvent inevitable subjectivity, German jurisprudence proposed the disruption theory of the contract's objective basis or on the foundation of contracts (*Wegfall der Geschäftsgrundlagen*). This theory aligns with the principle of good faith, averting the challenges of determining which party deserves a remedy to enforce execution, be satisfied with the frustration of the contract, or undergo forced renegotiation, precept later adopted in Section 313 of the BGB.

But what is the use of studying exceptional instruments applied to contract law to prove the existence of a state of exception? The evidence of such an argument requires mapping all the situations in which the disruption of contractual agreements brings into question the very nature of promises in contractual relationships, how likely they occur in a given juridical system, how the current order needs to suspend the Law to put those mechanisms into effect, and how the ontological nature of those agreements can be explained including the exception in the very heart of the enforcement of promises.

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[736] Wright, Aaron J. “Rendered impracticable: behavioral economics and the impracticability doctrine, 26.” *Cardozo Law Review*, vol. 2183, 2005. p. 2184: "Today, courts rarely find circumstances satisfying the modern requirements of impracticability. The rigid requirements of foreseeability and the common law concept of impossibility limit the impracticability doctrine's ability to provide 'flexible adjustment machinery, leading scholars to lament that 'the court must exercise its equity powers and pray for the wisdom of Solomon' when dealing with the rule." (Corbin on contracts, 1962).

Meanwhile, the idea of absolute liability is also pernicious since it imposes on the human condition the dealing with risks of previous knowledge for events that have not yet manifested. Entrenched in English Law, that rule constitutes the other side of the risk of unleashing promises, allowing parties to create bounds one cannot escape[737]. A bond one cannot escape is serfdom, whereas a contract from which one can always be discharged is a simulation[738]. That idea embodies a historically entrenched institution of serfdom juxtaposed with the analysis of modern contractual agreements by providing the basis for exploring the evolution of legal and societal obligations in the context of exceptions and how these elements intertwine.

Serfdom, a socio-economic structure prevalent in medieval Europe, was characterized by unyielding bonds. A serf, tied to the land owned by the lord, lived under inescapable obligations as dictated by societal norms and legal customs of the time. The inflexibility of this system, tantamount to forced servitude, offered no room for exceptions - the serf was bound to serve, irrespective of any changes in circumstance. But if one observes how contracts could hold individuals hostage of their words, which is not significantly different from imprisoning and holding them liable for eventual breaches. If the State had never surged to impose on parties the obligation to respect the given word, societies would never have left the status positions in which they were embedded[739].

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[737] see Ibbetson, David. "Absolute Liability in Contracts: the antecedents of Paradine v. Jane." *Consensus ad Idem: essays on the Law of Contracts, in honor of Guenter Treitel*. ed. by F. D. Rose. Sweet & Maxwell, pp. 3-37.

[738] Hatcher, John. "English serfdom and villeinage: towards a reassessment." *Past & Present*, vol. 90, no. 1, 1981, pp. 3-39. p. 24: "We find that contracts once entered into or arrangements once made quickly became inflexible, and frequently assumed a hereditary immutability, whether they related to the knight's fee, or the shire, borough or manorial farm. The limited term or negotiable contract, especially if it concerned land, was some thing which emerged only slowly and painfully in the context of sharply falling money values. Thus what we find in the humble world of the manor and village is but an expression of a force felt throughout the whole of medieval society."

[739] Graveson, Richard H. "The movement from status to contract." *Mod. L. Rev.*, vol. 4, 1940. pp. 263-264: "Even in feudal times methods of dealing with land were being quickly evolved; and attempts were being made by contract to vary or discharge the incidents of status. The commutation of villein services into rent, particularly after the Black Death, and the movement towards enfranchisement of villein, and later copyhold, land was indeed a movement from status to contract, though hardly in the sense intended by Maine. In later centuries a

Considering that the present study is mainly engaged with the flaws of the theory of absolute liability and the diverse solutions offered by different jurisdictions to mitigate the flaws caused by such an approach, Paradine v. Jane, even though constituting the landmark of absolute liability, signified a step ahead from the weight of a pure status approach to lead and to contractual arrangements[740].

Contractual agreements in contemporary legal practice embody opposite principles. They signify mutual consent between parties who engage as equals under the Law. While contracts do impose obligations, they inherently recognize the concept of exceptions. Parties to a contract are always entitled to be discharged from these obligations under various circumstances - contract breach, a mutual agreement to dissolve, or other legal allowances for termination.

In this regard, the contract serves as a 'simulation.' It creates a dynamic, adaptable framework of obligations designed to mirror rigid bonds of one's word but with the added dimension of flexibility. They accommodate the principle of exceptions, allowing contractual terms to be adapted, renegotiated, or even dissolved in response to changing circumstances. Serfdom, contracts, and the notion of exceptions uncover a critical evolution in societal and legal norms - from the unyielding bonds of serfdom to the fluidity of contractual agreements.

The exception, as a concept, transforms from a non-existent notion in serfdom to a vital part of the contractual machinery, reflecting society's move from rigid obligations to dynamic,

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continuation of this movement was in favour of nineteenth century individualism ;…*The importance of status decreased as, by the fifteenth century, estate came to be regarded as property, not as a status.*

740 Havighurst, Harold C. *The Nature of Private Contract,1961 Rosenthal Lectures*. Fred B. Rothman & Co., 1981. pp. 19-20: "In the nineteenth century under the influence of the classical economists, freedom of contract becomes a sacred thing. Over a period of several centuries to thinking men contract is not simply important; it is everything, or at least everything that is good. 'The definition of injustice' said Hobbes, 'is not other than the not performance of Conventant.' The tendency to ascribe to contract an all-embracing role is insidious. The Pollock and Maitland passage from which I quoted continues and concludes with the sentence: 'The idea that man can fix their rights and duties by agreement is in its early days an unruly anarchical idea. If there is to be any law at all, contract must be taught to know its place'."

negotiable commitments[741]. The contrast uncannily exposes the significance of exceptions in maintaining a balance between social order and individual autonomy, serving as a powerful reminder of the continual evolution of legal and societal structures.

That aspect of medieval contractual arrangements uncovers why contractual obligations were so tied to a minimal margin for adjustment, given that the preceding forms of societal ties were the land and even more restricted to the attachment to the land, serfdom, and villeinage.

On the other hand, a contract is a tested experiment in which parties behave as if they are in a hermetic environment of conditions that can be situationally reproduced, and it is not susceptible to unpredicted changes. By drawing a comparison between the rigidity of old real property rights and contractual forms, the inability to anticipate the future constituted a vital aspect of the formality of contractual obligations and the perennial nature of relationships formed based on a very limited exercise of will. Historically, visiting the events that caused significant societal disruptions is worth mentioning. The black plague eliminated more than 50 million people in Europe. Wars swapped the continent, and the unknown was the certainty of those communities that restricted their livelihoods to the limited territories they could afford a minimal level of safety with the cost of restricted freedom. In that given order, they could only count on the *Acts Of God*, as the doctor and the student stated.

[741] To refresh the hostage's sacrifices in the previous chapter Hazeltine, Harold D. "Formal Contract of Early English Law." *Colum. L. Rev.*, vol. 10, 1910, p. 608. The author alludes to the *god-borh* promise, a formal contract from the Anglo-Saxon period that, according to the author, is "to be viewed as a particularly solemn kind of formal promise. The debtor, by his solemn promise, binds himself and himself alone directly to the creditor: he provides no earthly sureties, but he calls upon God to be his surety for the faithful performance of his contract with the creditor. In this form the contract is of course strikingly like the promissory oath and the pledge of good faith." The noteworthy aspect of this passage is the historical evolution of contractual Law in Anglo-Saxon England, tracing the transition from suretyship, where a third party assumes responsibility if the principal debtor defaults, to self-suretyship, where the debtor solely binds themselves to fulfill the contractual obligation. This transformation expanded the role of formal contracts beyond specific cases like feud settlements and marriages, making them a universal tool for legally binding promises. This illuminating article on the legal history of contracts underscores the shift towards self-suretyship and introduces the concept of God-suretyship, where God serves as the surety. It evidences the significant roles of formal contracts in Church law for preserving peace, to which those ancient communities attributed liability as formal contracts result, positing personal and property liability theories.

But before continuing to scrutinize the available remedies and instruments in different legal systems to cope with the exception, it is worth pointing out why someone would assume such a task in the sense of what this research can contribute to forming a broader claim on the subject of the exception in Private Law. Nonetheless, the advantage of closely analyzing those institutions is worth the effort in times of uncertainty. First, it helps better to understand the flexibility and resilience of existing legal frameworks when faced with unforeseen or extraordinary circumstances. Examining how Law adapts to such situations can reveal its inherent capacities to cope with crises, highlighting the Law's ability to evolve and remain relevant in changing circumstances.

Second, such a study can expose potential gaps or inadequacies within the legal system. If conventional legal tools fail to provide just and equitable solutions in an exceptional context, this might indicate areas where the Law needs to be strengthened, clarified, or reformed.

Third, these explorations might uncover or foster the development of new legal theories or principles.

Exceptional situations often require subversive discipline to deal with them[742], an attribute that Comparative Law does not lack. The advantage of Comparative Law, as George Flecther acknowledges, is the one that "*expands the agenda of available possibilities."* And even though International Law somehow plundered Comparative Law by depleting the reasons for deploying a comparative method within a constrained parochialism, it also indulged the very nature of the subjecting conducting comparison. The difference in the quality of the comparison performed by an Internationalist and a comparatist resides in the comparatist's awareness of the impossibility of their task, regardless of whether covered in a neutral aspiration of enabling borrowing, harmonization, or functionality.

[742] Fletcher, George P. « Comparative law as a subversive discipline. » *Am. J. Comp. L.*, vol. 46, 1998, p. 683.

On the other hand, the Internationalist operates the same material as the comparatist and tends to absorb inclinations driving legislative purposes. If consensus is found among the players, legitimated to celebrate treaties, they will overlook the divergences in favor of holding the authority from an international command, here adopting Hart's rule of recognition precept. The comparatists, once unsuccessful in harmonizing Private Law, for instance, satisfied themselves with the much more herculean task of pointing out the inconsistencies and bigotries of their juridical landscape. By reading comparatists, one becomes aware that most are accomplished in disciplines ranging from legal history to Law and Economics, portraying the Law with enthusiasm not seen since the great hopes at the turning of the XX century. However, delusions always accompany the convergent/divergent paths one may encounter. Even though society bears the same emotions and drives, it should also obey principles oriented in those elements. However, aspirations and behavior do not correspond, and different jurisdictions demonstrate a greater or lesser tendency to concede.

Moreover, legal strategies are developed to manage the unforeseen, culminating in strengthening the Law since it constitutes an oracle of future events, either by anticipating it or shaping individuals with its *ought* pursuit. Finally, studying how contract law is applied during a state of exception helps build a body of precedent. This, in turn, can guide future legal responses in similar exceptional circumstances, providing clearer guidance for legal practitioners and those whose rights and obligations are shaped by contract law.

In a recent Revue des Contrats issue (2023/1), Xavier Pernot posed two valuable scenarios to be considered after the French Code reform. The first result of drafting force majeure contractual provisions to regulate its effects, and the second is whether legislators should limit force majeure events. For both, the author questions the feasibility of the parties' anticipation of unforeseen circumstances by asking:

"Cette volonté de restreindre la liberté contractuelle et l'adaptabilité du mécanisme de la force majeure au nom de la sécurité juridique ne nous paraît pas souhaitable. En effet, l'imprévisibilité est au cœur du concept de force majeure, elle en constitue même l'une des raisons d'être. Or, énumérer limitativement les cas de force majeure revient à fermer la porte aux événements qui, demain, seraient véritablement imprévisibles. Quel serait encore le sens de la notion de 'force majeure' ? »[743]

Doctrinal reformulation of *force majeure* in French civil is justified under the revamping of former provisions. The French solution to *force majeure* events was based on the "all or nothing" grounds. The debtor would walk free from the contract or denied impossibility to perform, regardless of how onerous such perfomance would become[744].

With the Code of Civil Reform, that model resembled the murky German approach in the sense of the multiple possible shades of imprévision. According to the new French provisions, they could be total or partial, permanent or temporary. These changes allow contractual clauses to become fluid as the distinction leading to complete impossibility and onerosity occur varies to the observed jurisdiction (Beale et al. p. 1172: "In practice, the distinction between the circumstance or events which render the perfomance of the contract impossible and those which merely make it more difficult or onerous is fluid.") The French reform engaged in a vaster dialogue that encompasses article 79 of the CISG (The United Nations Convention for the International Sales of Goods), as well as the Draft Common Frame of Reference (DCFR), and the UNIDROIT Principles of International Commerical Contract (UNIDROIT PICC). Impossibility and *force majeure* transit in zones of indistinction as

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[743] Pernot, Xavier. « La force majeure : fonctionnement et destinées. » *Revue des Contrats*, vol. 1, 2023, pp. 175-177. p. 176.

[744] Beale, Hugh; Fauvarque-Cosson, Bénédicte; Rutgers, Jacobien; Vogenauer, Stefan. *Cases, Materials and Text on Contract Law*, 3rd ed. Hart Publishing, 2019. 28.1, p. 1171: "A distinction is drawn between circumstances or events which render the performance of the contract impossible and those which merely make it more difficult or onerous. The position of French law on this question used to be clear-cut it was all or nothing. Either there was total impossibility, and the debtor was freed on the ground if force majeure (fortuitous event) or else he had to perform the contract, however onerous its performance had become. The new Code civil now recognizes both impossibility (force majeure) (Article 1231-1,1351) and *imprévision*, which means that the judge is given the power to revise or terminate the contract if it has become excessively onerous for one of the parties and the parties are not able to agree on an adjustment (Article 1195 Cciv). German law distinguishes various categories of impossibility and also allows the courts to adapt contracts on the event of change of circumstances. In English law, impossibility of performance includes the notion of that which renders the contract 'something radically different from that which was in the contemplation of the parties', which arguably goes further than *force majeure*. However, unlike French and German law, English law does not allow the courts to adapt contracts in the event id change of circumstances."

impossibility constitutes a condition for recognizing *force majeure*. However, being *irresistibility* a requirement for assessing *force majeure*, it surfaces how intertwined force majeure and impossibility is since force majeure contains impossibility on it[745].

And in the realm of exceptions, the French Code becomes once again the emblem and the closing of a circle on why codification appeared and will be relinquished.

Article 1218 1804's version stated that:

> *"L'obligation est indivisible, quoique la chose ou le fait qui en est l'objet soit divisible par sa nature, si le rapport sous lequel elle est considérée dans l'obligation ne la rend pas susceptible d'exécution partielle."*

The reformed version provided:

> *"Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur. Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1."*

III.III. The Influence of Public Law on Contract Dissolution: How War efforts influences Contractual Agreements and case law breaches experiences

Even though the primary distinction made between Public Law and Private Law arises from Ulpian's Public and Private law division, one acknowledges the existence of a system permeated by magical and religious beliefs, as seen at D.01.I.1.2 asserting:

> *" Huius studii duae sunt positiones, publicum et privatum. publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. publicum ius in sacris, in sacerdotibus, in magistratibus consistit. privatum ius tripertitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus."*[746]

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[745] Beale 28.3, p. 1174.

[746] Le impostazioni di questo studio sono due, il <diritto> pubblico e il privato. Il diritto pubblico è quello che riguarda il modo di essere della cosa <pubblica> romana, il <diritto> privato è quello che riguarda l'utilità dei

Among the aspects surfacing the eternal affirmation, one of the current concerns as a valid criterion that distinguishes both regards the economic category of individuals' utility, as opposed to a public utility or the public good. The idea persists even though sacred law, sacerdotal precepts, and magistrature are no longer the core of the public. Society learned how to worship immanent earthly values such as citizenry, the state, and rights. With that, it has been supplanted by constitutional law, a body of statutes that encapsulate the state and its authorities. According to Ulpian, within the realm of Private Law, it remains a subject of deliberation whether natural precepts, the law of peoples, and civil law are exclusive components of Private Law or whether they envelop all laws

Indeed, the criteria distinguishing public and private law have always been subject to debate and interpretation, with the pendulum of thought swinging between individual utility and public good. Ulpian's ancient perspective, though it no longer strictly applies in today's legal landscapes, lays the foundation for our contemporary understanding of the dichotomy. As sacred law and religious mandates have evolved into constitutional and state law, Ulpian's lasting influence persists on the individuals' utility notion as opposed to the public good as the guiding principle of the private.

When legal systems develop to a degree where the distinction between public and private law is dissolved, as Michael Stolleis illustrates through his examination of German law during the era of National Socialism, a precarious state of non-differentiation emerges. This condition is characterized by the state consuming the protective boundaries that should be provided for individuals or organized communities. In light of the evidence provided by the nazi regime structure, he suggests that the risk posed by a centralized power controlling all

singoli: alcune cose sono infatti di utilità pubblica, altre sono di utilità privata. Il diritto pubblico consiste negli istituti del diritto sacro, nei sacerdozi, nelle magistrature. Il diritto privato è tripartito: è composto, infatti, da precetti naturali o delle genti o civili.

facets of existence is far too dangerous to be bestowed upon a singular authority. In the fascinating "A History of Public Law in Germany 1915-1945", a compelling passage pertinent to this passage must be glanced at:

> *"Finally, one of the most important characteristics by which one could recognize a 'progressive' position in the National Socialist sense was the declaration that the opposition of public and private law had now been 'overcome'. Indeed, a regime that was propagating the 'Volksgemeinschaft' could no longer recognize the separation of the two spheres of law that nineteenth-century liberalism had elevated into an a priori juxtaposition. Where unity between leadership and followers was supposed to exist, there was no longer any room for basic rights and protection 'against' this very* Volksgemeinschaft*. The 'völkisch totality' was understood as a 'universal, all-encompassing, and all-pervading phenomenon' in the sense of a complete 'integration of all Volk comrades into service to the entire Volk', which thus meant that there was no possibility of 'separating or isolating oneself'. In general, the differences between state and society, public and private, the individual and the community carried less and less weight. They interfered with the direct access to and the direct disposition over the 'Volk comrade'. One theoretical problem in the rhetoric of 'overcoming' lay in the fact that Kelsen, of all people, had also rejected the dualism of public and private law. That created a problem of demarcation: anyone who wished for the 'overcoming', namely one that was concerned with the theory of legal norms. Anyone who was charting a middle course would use this same argument, though he would interpret 'overcoming' not in the sense of a complete abolition, but only as a thorough ethnicization and politicization of the old duality, while at the same time shifting the weight decidedly toward public law. In any case, it was important not to confuse the 'unity of the legal world-view' (Verdross) postulated by the Vienna School with the notion of unity derived from a* völkisch *common law".*[747]

The concept of '*Volksgemeinschaft*,' or a people's community, blurred the distinction between the two legal domains. In its pursuit of uniformity and collectivism, the regime rendered the separation of law into private and public spheres irrelevant, paving the way for a singular, overarching legal domain that left no space for individual rights or protections against the regime[748]. To interpret this 'overcoming' does not necessarily mean the absolute abolishment of the two spheres, but rather, a careful recalibration that allows for the politicization and ethnicization of the old dualism while maintaining a clear emphasis on public law. The word *Volk*, also present in English as folk, and denotes the collectivist idea that

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[747] Stolleis, Michael. *A History of Public Law in Germany, 1914–1945*. Translated by Thomas Dunlap. Oxford University Press, 2004. pp. 358-359.

[748] See Kirchheimer, Otto. *The Rechtsstaat as Magic Wall, in The Rule of Law under Siege: selected Essays of Franz L. Neumann and Otto Kirchheimer*. Edited by William E. Scheuerman. University of California Press, 1996, pp. 243-263. pp. 257-258: Our world knows no magic wall separating the structure of private from that of public law. […] The private-public dichotomy is thus largely a matter of the different manipulative concerns of various agencies. It offers no clue to the problem of which relationships should be left to private arrangements and what form necessary cooperative arrangements should take.

conceals the individual in the amalgamation of the whole. This blend avoids distinctions and particularizations, as if everyone belongs in the same manner.

The most striking feature of the new place where Private Law is situated regards Private Law undertaking Public Law accomplishments of dominating aspects of existence by other means, such as assuming the role of privatizing justice and setting the standards of what constitutes substantive Law[749]. What surfaces in this shifting prestige is the fact that the wholeness of the Volk was replaced by the atomized individuals: the consumer, the user, the one who agreed to terms and conditions. On the other side corporations were also merged as if the fictional entity represents all sorts of organizational structures, the liberal professional incorporated stands as fictional as transnational organizations. The subtraction of adjudication from the public branches had an effect of recrafting Private Law with monocular lenses, observing from above the parties' interactions as composing a homogeneous reality.

The remedial apparatus available for solving frustrated contracts is an example of Private Law new states of affairs. Constituted a proposition conferred by legislation to distribute the risks that parties did not calculate through drafting hardship or force majeure clauses, it ignores asymmetries preceding the allocation of costs found in contract terms. Contracts became the token for absorbing sovereign features, but now assembled in a rather diverse form. The shield of protection for entities exercising dominance over the others redrafted every contractual rule on their behalf, but it is not visible as it was when codification emblematized the world order. Freedom is not exercised unconstrained, but its applicable for the parties who took over the predominance in the regime.

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[749] Even the scholarship within the field of arbitration has been raising concerns over that process, see Lorfing, Pascale Accaoui. "Adaptation of Contracts by Arbitrators: realities and perspectives." *Hardship and Force Majeure in International Commercial Contracts: dealing with unforeseen events in a changing world*. Edited by Fabio Bortolotti and Dorothy Ufot. International Chamber of Commerce, 2018, pp. 40-81. p. 68: "The limit of contract adaptation by arbitrators if the parties' lack of satisfaction with the award rendered. Indeed, arbitrators may impose an undesirable contractual adjustment. This would raise the question of the suitability of arbitration as a forum for resolving disputes especially in long-terms contracts in specific field sectors such as gas. An arbitrator's award on adaptation of the contract may be challenged by an unsatisfactory party."

Above all, the unchecked freedom escaped Private Law to a new realm, away from jurisdictional boundaries, creating a self-regulated entity to permanently exercise a *forum shopping* picking in all domains of Law: tax law, adjudication, administrative and regulatory law, contractual clauses, consumer disputes. The few themes still encroached jurisdictions were subjected to special forms of control differing from the standard offered by a given jurisdictions, for that purpose trusts, holdings, joint ventures. Is a complete amalgamation of commercial enterprises, public and private law, procedures, and the capacity to be subjected to a sovereign the main aspect of change. The role of remedies and the theory of frustration in general rooted in case and enacted national law were re-casted in the international arena, leaving for national jurisdictions the echo of changes at international and transnational level.

On the other hand, relief for frustration requires enacted state legislation to exercise control over parties' will in open or closed remedial forms. Whereas some advocate for the benefit of providing remedies to mitigate the strictness of *pacta sunt sunt servanda* relief in periods of economic distress, others warns that it must be present specific conditions for jurisdictions that adopted an open remedy solution for contractual sanctity[750], such as the German situation in which after inflation affected the country with unexpected hikes[751], case

[750] See p. 11 French contract law reform Stoffel-Munck, P. H. « Les enjeux majeurs de la réforme “attractivité, Sécurité, Justice”. » *Réforme du droit des contrats et pratique des affaires*, 2015.

[751] The Association of Judges at the Reichsgericht were compelled to warn the Reich on the threats of dismissing approaching certain claims on the mark’s devaluation, specially to avoid confiscation of property through monetary policy. Unfortunately, the outcry was ignored, and the continuation of this saga became History. The jurists' proclamation, dated January 8, 1924, was a potent dissent against the Reich Government's contemplated revaluation prohibition of mortgages and other monetary claims, a move seen as opposing the courts' developing doctrine in response to the catastrophic hyperinflation of the 1920s. The jurists' argument was primarily grounded in the principle of "Treu und Glauben" (good faith), which they argued should be the cornerstone of the legal system, and any potential government action conflicting with this principle was perceived as detrimental to justice.
In their view, this principle justified a balanced adjustment of interests between debtors and creditors during the monetary devaluation - a far cry from the government's proposed blanket prohibition of revaluation. The jurists argued that the proposed governmental action could lead to unjust outcomes contrary to good faith and could be seen as unconstitutional expropriation. They feared this legislation could be struck down by the courts or lead to a severe blow to the public's faith in justice. This document articulates a significant dispute over handling the dire economic circumstances, reflecting a clash between legislative prerogative and the evolving judicial understanding of contractual fairness in times of crisis.
Richterverein beim Reichsgericht. (1924, January 8). Der Richterverein beim Reichsgericht an den Reichskanzler [Letter to the Reich Chancellor]. In E. R. Huber (Ed.), *Dokumente zur dt. Verfassungsgeschichte, Bd. 3* (p. 383 f.). Stuttgart: JURISTISCHE WOCHENSCHRIFT. Available at:

law adopted the system of *Wegfall der Geschäftsgrundlage.* Where jurisdictions never faced such economic impact pervading all economic activities the remedy appears to be inadequate and inoperative, even when transplanted after the success codification of the institution in the German context[752].

Even though, as it will be further developed, Windscheid presupposition theory was conceived still in the end of the nineteenth century[753], his categories were further taken and developed with Paul Oertmann's Geschäftsgrundlage[754]. From that stage, the theory gained steam, consolidated in German courts, mainly the *Reichsgericht*[755], as the remedial paramount for balancing wrecked contracts.

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https://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/00a/ma1/ma11p/kap1_2/para2_49.html, accessed on July 05, 2023.

752 The convoluted German landscape following the spiral mark inflationary period produced one of the most fruitful precedents for analyzing changes of circumstances. As a relevant illustration see Case reference [e.g., RGZ 100, 129 III. Civil Senate] (Eng. translation) in the web site of The University of Texas School of Law, available at https://law.utexas.edu/transnational/foreign-law-translations/, accessed in July 05, 2023. This decision from the Reichsgericht, in light of the inflationary period in 1920s Germany, reflects judicial adjudication on the disruption of contractual balance due to severe economic conditions caused by the war. In this case, the Reichsgericht denied the application of the plaintiff's contentions for a price adjustment, which concerns contractual alteration and violation of good morals, respectively. However, it accepted the argument based on the *clausula rebus sic stantibus* as contractual inapplicability or needed modification due to the drastic changes in circumstances of the period. Given the multiplication of impracticability from the inflationary times, the decision represented an abrupt paradigm shift to the previous rulings. Although not yet recognized as a general rule by the Reichsgericht, it became applicable due to the extreme economic transformations stemming from the war's aftermath. These changes were so profound that they necessitated an alteration of the existing contract to ensure economic fairness to both parties. The Reichsgericht established criteria for invoking the clausula rebus sic stantibus, stressing the requirement for continued contractual intent, exceptional and unforeseeable change in circumstances, and fair adjustment of interests between parties. The court affirmed that the plaintiff's demand for price modification was justified, assuming that his economic situation had changed significantly due to external circumstances, and represented a significant contribution to the legal understanding of contractual adaptations in times of severe economic crises, such as the inflationary period of 1920s Germany.

753 Windscheid, Bernhard. "Die Voraussetzung." *Archiv für die civilistische Praxis*, 1892, 78.H. 2: 161-202.

754 Oertmann, Paul. Die Geschäftsgrundlage : ein neuer Rechtsbegriff, Leipzig [u.a: Deichert, 1921]. On the dialogue between Windscheid's and Oertmann's theory see Locher, Eugen. Gefchäftsgrundlage und Gefchäftszweck. Archiv für die civilistische Praxis, 1923, 121.H. 1: 1-111.

755 For a deeper appreciation of Reichsgericht's application of open remedy solutions, it is essential to recognize the emerging tension within the socio-political landscape of the time. The Reichsgericht's approach was met with skepticism by the burgeoning National Socialist regime, as it embodied a broadened exercise of judicial activism, an initiative not always embraced by conventional legal theory. This dynamic tension is explored in a detailed analysis by LÖHNIG, Martin. 3 Germany: The Reichsgericht 1933-1945. In Supreme Courts Under Nazi Occupation, Amsterdam: University Press, 2022, pp. 57-80, p. 59: "In his speech at the anniversary ceremony, the Court's new president Bumke addressed the judiciary's permanent crisis of confidence and the 'low level of law.' Remarkably, he did not hesitate to admit this crisis – not without suggesting a solution, of course: In his opinion, freedom and independence of the judiciary from written law were answers to 'stormy and rapidly changing times.' Judges needed to be able to adapt the law to new developments. But keep in mind: In fact, one of the main reasons for this 'crisis of confidence' Bumke and others complained about was

In an article that John Paul Dawson wrote in 1934 before National Socialism overthrew the juridical order, the perception that the inflationary period did more than just imbalance contractual arrangements assumed the contours of a prophecy. Even though in analyzing the Reichsgericht's role as a driver for social change, mainly to adjust contracts affected by the inflationary period following Germany's defeat after the First World War, Dawson was favorable to the Court's courage to transcend governmental lack of attitude to address the matter, he glanced at the multiple implications the interference could lead. Indeed, the results from the Court's judicial activism towards adjusting contracts became a door by which the Third Reich could capture the Court. In his conclusion:

> *"There were times, it is true, when the Reichsgericht seemed unable to respond to the overwhelming need of a society in dissolution. A complex judicial machinery could not be geared to the speed of progressive economic disaster. But if the response seemed tardy it was because the pace was fast. Seldom in history has there been a revolution in judicial thinking so complete, in the short space of four or five years. In retrospect it seers plain that every available resource of legal science was applied to relieve the mounting burden of intolerable injustice, to preserve what was left of order in the midst of universal collapse, and finally to reconstruct those values that the wreck had not wholly destroyed."*[756]

A rampant inflationary period, as analyzed in depth by Dawson, spurred more than the mere application of legal theory to isolated cases due to the exorbitant interest rates. With the conflict escalating, the practicality of uniformly applying a flat rate, say 15 or 25 percent, to all revalorized obligations became increasingly untenable. Influential voices called for each case to be individually adjudicated, despite the potential for extended uncertainty, burgeoning

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the generous way in which the Court handled general clauses. On the one hand, since the day the Bürgerliches Gesetzbuch (BGB) came into force (1 January 1900), legal practice has been strictly bound by written law. On the other hand, in certain cases, positive law, which was considered unjust, had to be open for corrections, especially after World War I with its enormous social and political transformations and problems. The means, again, had to be provided by written law itself. For example, the Reichsgericht ranked norms such as § 138 BGB (immorality) or §242 (good faith) higher than others and started using them as control and correction instruments, which they still are nowadays. As a consequence, judges finally took the legislature's role by closing normative gaps. Philip Heck, leading proponent of the doctrine of jurisprudence of interests, rightly defined §242 BGB as a 'delegation norm'. In fact, the fathers of the German Civil Code had been aware of these consequences and they way general clauses were supposed to work, as they referred to § 138 BGB as a 'meaningful legislative step'."

[756] Dawson, John P. "Effects of Inflation on Private Contracts: Germany, 1914-1924." *Mich. L. Rev.*, vol. 33, 1934, p. 238.

litigation, and arbitrary decisions. Dawson also pointed out in a footnote that Oertmann held a counterview. According to Oertmann's theory, cases should not be treated *en masse* but evaluated individually based on principles of good faith. This approach further emphasizes the need for individual consideration in adjusting obligations, highlighting the multifaceted complexity of legal and economic decision-making during drastic inflation[757].

The synchronicity between the ascension of the National Socialist regime and the juridical tentative to maintain order in a dissolved social and political compromise appears to be more than mere coincidence. It exposes the state of denial on believing that courts and ultimately the Law can rearrange the balance of powers in society[758]. Instead, all the mechanisms allowing for contractual interference, and intrusion in Private Law more broadly facilitated the system to be preyed by the National Socialist Public Law totalizing regime.

Certain claims enter in the uncharted territory of establishing a cause-and-effect relationship between contractual interference and the systematic deployment of judicial remedies in contracts, but those events suggest an unavoidable correlation of a sequence of events leading to the fall of the Weimar Republic and the appearance of a total regime, exposing a direct relation between both. Public Law encroached in every aspect of living with the ascension of the National Socialist Party[759], preventing the Jewish community from exercising

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[757] See Dawson, John P. "Effects of Inflation on Private Contracts: Germany, 1914-1924." *Mich. L. Rev.*, vol. 33, 1934, p. 214: "The extension of a flat rate such as 15 or 25 per cent over the whole range of revalorized obligations was dearly impossible. Indeed there were strong demands from influential quarters for an individualized treatment of each particular case, even at the cost of prolonged uncertainty, multiplied litigation, and arbitrary decision." And as he inserted in a footnote, Oertmann theory supported the opposite perspective, that cases should be evaluated individually on principles of good faith.

[758] On the role of the *Reichsgericht* President Erwin Bumke see Müller, Ingo. *Furchtbare Juristen: die unbewältigte Vergangenheit der deutschen Justiz*. Verlag, Fuego, 2014. p. 54.

[759] Stolleis, Michael. *The Law Under the Swastika: Studies on Legal History in Nazi Germany*. Translated by Thomas Dunlap. Chicago Univ. Press, 1998. pp. 86-87: Ulpian's formula of the duae positiones (Digest 1.1.1.2) supplied the venerable principle of categorization. Even when liberalism had passed its zenith in 1878 and found itself on the defensive with regard to the interventionist state, this dichotomy was retained as an intellectual construct. The new labor and social law, the war administration law, the social tenancy laws, and the business law of the 1920s barely encroached upon this dogma. Even textbooks from the end of the Weimar period gave no indication of a serious doubts about this legal dualism. Only National Socialism made an official and emphatic break with nineteenth-century current of traditions, proclaiming a new unity of the legal order and declaring that the separation of state and society was as outmoded as the basic rights of the citizen. Residues of privacy were to be dissolved, society was to be integrated into the state and the state into the

commercial activities, confiscating their property[760], establishing the parties authorized to celebrate contracts, segregating the undesirable in ghettos, and ultimately imposing what parties are allowed to bargain and when the bargain or its continuity is not satisfactory. This process was accomplished in a two-step progression, first by suppressing the *Reichsgericht* capacity to adjudicate disputes with BGB general clauses. Secondly, by calling to its competency the task of dismantling Private Law as a liberal device for successively enacting legislation supposedly solving the economic hardships that courts by themselves could just alleviate until a recovery process is achieved.

In terms of degrees, intruding on individuals and communities Private Law is not comparable to controlling the freedom of contracts parties orient themselves. However, it demonstrated the need to rebuild the core of the system with built-in rights protecting freedom to not be exploited[761].

'movement'. Legal literature after 1933 was in agreement that the old antagonism between public and private law had now been 'overcome'. No other maxim has been widely accepted as this one."

760 One of those instruments regarding interference on access to credit and therefore circulation of property rights is described in Kirchheimer, Otto. "State Structure and Law in the Third Reich." *The Rule of Law under Siege: selected Essays of Franz L. Neumann and Otto Kirchheimer*. Edited by William E. Scheuerman. University of California Press, 1996, pp. 142-171. p. 164: "One of the most striking legal innovations of the Third Reich, the Hereditary Estate Act, aims to 'preserve the source of German blood, the farming community, by securing the continued existence of old German inheritance customs.' In three different respects, this law signifies a radical break with previous laws. First, it prevents non-Aryans – defined in the broadest possible sense of the term – from acquiring even average-sized agricultural properties. The second decisive legal changes consists of making it illegal to mortgage a hereditary farm or to put it for sale…But this also means, as the legislature was well aware, that the hereditary farmer is prevented from gaining credit on his real estate."

761 For a cross-jurisdictions remedies overview see: Smit, Hans. "Frustration of Contract: A Comparative Attempt at Consolidation." *Columbia Law Review*, vol. 58, no. 3, 1958, pp. 287-315. p. 299: "Consistent application of the gap filling theory has led the Reichsgericht to what would seem the inescapable conclusion that the occurrence of unforeseen events does not invariably require that the contract be considered at an end, but that such occurrence may, in proper cases, necessitate supplementation with provisions creating different rights and duties. The Reichsgericht has not shunned its duty in such cases to define equitable provisions under which the contractual relationship continues. Most famous are the so-called Aufwertungs-fälle, in which the Reichsgericht, rather than declaring the contract at an end, increased the amounts specified in the contract." The open clause remedial solution offered in the context of Smit's preference for the "Gap Filling Doctrine," or "Lückenausfüllende Auslegung" in German jurisprudence, is portrayed as a versatile and essential tool for maintaining contract enforceability in situations where unforeseen circumstances arise. This doctrine can potentially transform the landscape of a contract, without terminating it, by creating different rights and duties for the parties involved. Smit gives the prominent example of the "Aufwertungsfälle," where the Reichsgericht, the highest court of the German Empire, chose not to annul the contract due to an unforeseen event. Instead, it intervened in the contractual obligations by adjusting the contract's specified amounts. This intervention was a creative application of the "Lückenausfüllende Auslegung," using it as a tool to address gaps or absences in contracts caused by unexpected events. But, the judicial remedial approach coming from the Reichsgericht

In contrast to the ascension of the Nazi regime, where public authorities controlled all aspects of private interactions, our current reality appears more akin to public authorities being captured by private interests. Therefore, the changes are not even beneficial for the centralization of state authority. Governmental officials were captured by private interests concentred in spheres outside national jurisdictions.

Paradoxically, the former Publicization of Private Law took the opposite direction, it was replaced by the privatization of every space, since the decision-making power has been awarded every day with mote intensity to private parties. The shift towards Privatization of Private Law is marked by an attempt to comply with more uniform standards, a legal framework to be replicated across transnational borders, and a scholarly influence no longer exclusively subjected by state enacted law. The multifaceted patchwork assumes contours described as:

> *"All these developments concern the shift of state power to other states or global institutions. Yet, perhaps the most important development of globalization is the shift away from states altogether towards the private sphere. In a globalized world, in addition to states, an increasing number of non-state institutions-NGOs, multinational corporations, and individuals- are relevant international or transnational actors. In various ways and degrees, these have all become not only subjects and objects of international law, but also creators and shapers of law. Since these organizations are private, the resulting law is a kind of privatized private law that is independent from the state to the extent that the state does not interfere and is not required for its enforcement." (Ralf Michaels & Nils Jansen, Private Law beyond the State - Europeanization, Globalization, Privatization, 54 AM. J. COMP. L. 843 (2006).)*

The complexity of modern legal systems requires a constant dialogue between public and private law, and this can be seen in the mechanisms of exceptions and defenses within legal procedures. This interaction is exemplified in the legacy of Roman jurisprudence, where the 'praetor' was responsible for overseeing the disputes brought before him, offering a balance between public and private interests. As Fritz Schulz elucidates[762], the plaintiff presented a

proved to be a failure, since it enabled the authoritarian regime to operate and intervene in contractual matters by suppressing adjudication independency.

[762] Schulz, Fritz. *History of Roman Legal Science*. Clarendon University Press, p. 50.

draft statement of claim or 'formula' to the praetor, which the defendant could propose modifications to, including the insertion of a special defense (exception). Settling this 'formula' required jurisconsults' intervention, indicating the role of legal knowledge in ensuring the fair operation of justice.

In Roman law, the public-private interaction becomes particularly manifest when we examine the *in rem* and *in personam* classifications of obligations and their corresponding exceptions. The praetor could use his edict to outline obligations 'in rem', which generally operated, or 'in personam', which referred to the duties of a specific individual[763].

Nevertheless, the influence of such mechanisms was not confined to Roman jurisprudence. They echoed through subsequent legal systems, including Italian law, where Guido Astuti highlighted the profound influence of the formulary procedure of classical Roman law on the substantive regime of contractual obligations[764]

The intersection of public and private law facilitated the development of legal science. The 'dialectical method'[765], as discussed by Schulz, was of extreme importance in the

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[763] Holland, Thomas Erskine. *The Elements of Jurisprudence*. Oxford University Press, 1917. pp. 145-146: "The use of these terms to distinguish between two History of classes of rights is of comparatively recent date, but is quite in harmony with their use by the classical Roman jurists, in distinguishing between different classes of stipulations, pacts, actions, exceptions and edicts. Any of these are said to be 'in personam' if referring to the duties of a given individual, 'in rem' if operating generally. Thus we are told: ' Praetor in hoc edicto,' i. e. quod metus causa, 'generahter et in rem loquitur, nee adicit a quo gestum.' 'Pactorum quaedam in rem sunt, quaedam in personam. In rem sunt, quotiens generaliter paciscor ne petam ; in personam quotiens ne a persona petam, id est ne a Lucio Titio petam' This use is also analogous to the description of judgments as being in rem or in personam, and to the mediaeval distinction between 'statuta realia ' and personalia'."

[764] Astuti, Guido. *I contratti obbligatori nella Storia del Diritto Italiano. Parte Generale, Volume Primo*. Dott. A. Giuffrè Editore, 1952. p. 24: "E allora, si domanderà a questo punto, i principi informatori dei contratti non presenta mai nulla di nuovo? Al contrario: come dicevamo all'inizio di queste considerazioni molteplici e notevoli, sia in ordine alla formazione e ai requisiti di validità dei contratti, sia in ordine ai loro effetti giuridici, obbligatori o reali. Basterà ricordare la specialissima influenza esercitata dal sistema processuale formulare del diritto romano classico, sopra il regime sostanziale delle *obligationes ex contractu*, modellatosi secondo la particolare struttura delle relative *actiones*, e gli sviluppi del sistema contrattuale nel diritto postclassico e giustinianeo, in correlazione con la caduta della procedura per formulas. Ma qui possiamo far punto, ed entrare ormai nel vivo della nostra indagine, cominciando precisamente dallo studio della formazione storica del sistema contrattuale romano."

[765] Schulz, Fritz. *History of Roman Legal Science*. Clarendon Press, 1953. p. 62, dialectical method. P. 67-75: "The importance of dialectics was a matter of extreme significance in the history of Roman Jurisprudence and therefore of jurisprudence generally. It introduced Roman jurisprudence into the circle of the Hellenistic professional sciences and turned it into a science in the sense in which that term is used by Plato and Aristotle no less than by Kant. It was only systematic research and organized knowledge that can properly be so called, and these are attainable only by the dialectical method. It was only through dialectic that Roman jurisprudence

advancement of Roman jurisprudence and thus jurisprudence generally. It facilitated systematic research and organized knowledge and offered a refined approach to the interpretation of the statutes, proposing actions or exceptions[766]. This dialectical method introduced a logical structure and unity to the handling of legal disputes, aligning private interests with public policy.

Moreover, in these nodal shifts, juridical changes demarcate a former and a new epoch on the uses and applications of the Law. As the *Lex Rhodia* embodied in the Digest a novel *lex mercatoria*[767], it also epitomized the division of the sovereignty, recognizing the unfeasibility of ruling over all realms, as Professor Monateri provides in his magistral interpretation of the Digest 14.2.2.2:

> *"What is rightly underlined in his account is that this passage of the Rhodian law pertains to* ***emergency*** *cases: wrecks, jettisons, death by water. What we mean is that this law, and the occasioned decision by the emperor, had to deal with a case of necessity, and that it is tantalising to discover that an assertion of global sovereignty was rendered in a structural combination with states of exception. In a case of wreck, all the goods saved were valued as potentially part of the restitution owed to* locatores *(the owners of the cargo), including those goods that did not contribute to the actual weight of the shipment, such as gemstones or pearls (Dig 14.2.2.2). The context in which the Rhodian law was applied was that of a storm creating actual danger of shipwreck, which forced the taking of extraordinary measures to avoid the sinking of the ship and the consequent loss of cargo (Dig 14.2.2; Dig 14.2.6). For the Rhodian law to apply, the ship had to have been saved by the adoption of those extraordinary measures, which included jettison but also extended to the severing of the mast or the riggings (Dig 14.2.3). The regulation of this sharing of risk was extended to cases of piracy, when part of the cargo was used as ransom to pay off the pirates (Dig 14.2.2.3). It is then rather intriguing to note that the occasion for the emperor to proclaim his universal sovereignty was given with reference to cases of emergency and peril, and also with reference to piracy.* ***As long as our modern ideas are connecting sovereign powers with a state of exception, it could not be underscored enough that the most blatant assertion of a universal sovereignty came along in the Digest with direct reference to states of emergency in that which is the perilous, fluid and ontologically strange domain of the sea****." [768]*

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became fully logical, achieved unity and cognoscibility, reached its full stature, and developed its refinement. […] But the problem raised for them as practising lawyers was always simply this: is it possible to meet the given case either by interpretation of the statute or by propounding an action or an exception? A negative *responsum* rendered further discussion useless, because the amendment of statutes is no part of a practising lawyer's business, while an affirmative responsum purported to lay down what was the law (ius), not to correct the law by equity (aequitas)."

[766] Schulz, Fritz. *History of Roman Legal Science*. Clarendon University Press, 1953. p. 75: "But the problem raised for them as practising lawyers was always simply this: is it possible to meet the given case either by interpretation of the statute or by propounding an actio or an exceptio ? A negative responsum rendered further discussion useless, because the amendment of statutes is no part of a practising lawyer's business, while an affirmative responsum purported to lay down what was the law (ius), not to correct the law by equity (aequitas).

[767] Benedict, Robert D. "Historical Position of the Rhodian Law." *Yale LJ*, vol. 18, 1908, p. 223.

[768] Monateri, Pier Giuseppe. *Dominus Mundi: Political Sublime and the World Order*. Hard Publishing, 2018. pp. 22-23.

Confronting the implications of the recognition of an exception in a self-help act exposes a very radical idea, that the space of jurisdictional void and incapacity of enforcing commands releases unsurmountable energy. By operating unrestrained, parties acknowledges the need for granting the sovereing control over that freedom. Unlimited violence agaist the other on the absence of state operates as to inflict compliance when the sovereing personilizes itself and exercise control over peoples'souls. Parties controlling their destiny without limits may result in indulgent behavior, deviating from acceptable social norms.

That evidence was also well observed by Ullmann while explaining sovereignty's kernell:

> *"There was one more basic topic that exercised great influence on the development if governmental ideas. The so-called* Lex Rhodia *(D. 14, 2,9) contained the statement that the emperor was the* Dominus Mundi*: this was the theme which was to gain even greater and more topical significance in both Byzantium and the medieval West. Since the Roman emperor was the 'lord of the world' and since for both East and West the same Roman law was the commonly accepted law, it assuredly would have been a contradiction in terms if there had been two lords of the world each claiming universality of jurisdictions and dominions. Yet this was exactly the case once there was a Roman emperor in the West from the ninth century onwards. Scholarship (civilian as well as canonistic) based itself on this passage in the Digest to maintain not only legitimacy of the emperor in the West as the sole 'lord of the world' but also his superiority (=sovereignty) over all others kings and Rulers, including the Byzantine emperor. […] Nevertheless, this adoption and application of the Roman tutorship had additional significance in so far as it show how a purely private law function was transferred to the public law: the sphere if the Roman tutor was exclusively within the Roman private law. This transfer of private law institutions to the medieval public law was a most noteworthy feature. Yet on the other hand the tutorial function of the Ruler proved itself a rather effective impediment to the release of people from the Ruler's 'tutelage'. While the tutorial function effectively restricted the Ruler, it did not assist the process by which the people itself attained 'majority' for the very idea of a tutor presupposed a minor under age in whose interests the tutor acted. The more effective the Ruler's tutorial function was, the more conspicuous became the people's 'minority', and therefore the greater were the obstacles which retarred the emergence of the abstract notion of the State."*[769]

The intersection of public and private law, particularly through the mechanisms of exceptions and defenses, plays a relevant role in advancing legal systems. This intersection, as

[769] Ullmann, Walter. *Law and Politics in the Middle Ages: an introduction to the sources of Medieval Political Ideas*. Cornell University Press, 1975. pp. 57-59.

illustrated in the historical context of Roman law, offers a lens to appreciate the oscillations between individual rights and the overarching public interest. Not only does it affirm the indivisible bond between public and private law, but it also underlines the need for their constant interaction for a just and efficient legal system. Foremost, the reason why Public Law was advanced as the all-contained discipline regulating society can be attributed as a work corresponding to the emergency of the nation-state. Weber's rationalization of social structure also affected the need of state bureaucracy and therefore detach from former private forms.

Among the aspects surfacing the eternal affirmation, one of the current concerns as a valid criterion do distinguish both regards the economic category of individuals' utility, as opposed to public utility or the public good. The idea persists even though sacred law, sacerdotal precepts and magistrature are no longer the core of the public. It was replaced by constitutional law, the law of the state encompassing its authorities. In Private Law, according to Ulpian, its open for debate if natural precepts, law of peoples and civil law are part of Private or englobe all laws.

III.IV. Judicial Intervention and Solutions: Converging Codified and International Approaches, Hardship and Force Majeure

Schmitt's "Sovereign is he who decides on the exception"[770] became so cliché that it no longer has a suitable meaning. That sovereign figure resembles a public monarch, and it is often invoked to claim immunity for abuse, to reconcile an exit to the public-private dichotomy, insufficient to grasp and provide an encompassing understanding of reality.

[770] Schmitt, Carl. Political Theology: Four Chapters on the Concept of Sovereignty [1922, translated by George Schwab], Massachusetts Institute of Technology, 1985, p. 5.

The who deciding what conforms with the exception requires some further explanation that pertains to situations where the established norms or rules are insufficient or unable to endure a previous order, demanding an entity or figure (usually the sovereign) to suspend the existing laws and go beyond or outside of the existing laws. The exception regards a decision not derived from established norms but requires creating new ones. One way could be through establishing a principle in case law, through courts making decisions on specific cases that do not fit neatly into the pre-existing legal norms. When these decisions create a new legal principle or standard, that could be seen as an 'exception' to the existing norms – not in the sense that it disregards them, but in the sense that it establishes a new norm derived from a specific decision, much like the 'sovereign decision' in Schmitt's theory.

An example of such an 'exception 'is the principle of 'promissory estoppel' in contract law, allowing a party to be held to their promise even without a formal contract, effectively creating an 'exception' to the usual norms of contract law[771]. It arose from a judge's decision in a specific case and became a norm with broader application. In this regard, the very origins of Roman *exceptio*[772], thus transferred nominally to procedural Law and substantively to Private Law, fulfill the same sort of arrangement provided here.[773] As Schmitt poses in a very

[771] as in the case decided by Lord Denning on Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130.

[772] Di Marzo, Salvatore. Le Basi Romanistiche del Codice Civile. Torino: Unione Tipografico. 1950, p. 262-263: "Ma per gli altri casi occorreva un rimedio speciale in difesa dell'ingannato. A tale necessità provvide il pretore, introducendo sulla fine della repubblica un'actio doli, concessa contro l'autore del dolo alla vittima di questo, che avesse già adempiuto agli obblighi assunti col negozio, per ottenere la riparazione del danno sofferto, se non avesse altro mezzo giuridico per conseguire tale scopo, e una *exceptio doli*, accordata alla vittima del dolo, che non avendo ancora adempiuto agli obblighi assunti col negozio, fosse chiamata in giudizio per l'adempimento. L'actio doli e la exceptio doli perdettero nel diritto giustinianeo l'originario carattere di rimedi pretorio, il dolo, che nel diritto classico apriva soltanto l'adito a quei mezzi di difesa, venne in considerazione in rapporto allo stesso ius civile come un vizio del negozio." Serpa Lopes, Miguel Maria. Exceções Substanciais: exceção de contrato não cumprido (*exceptio non adimpleti contractus*), Rio de Janeiro, São Paulo: Livraria Freitas bastos, 1959, p. 130-131: "A boa-fé e a equidade são os glóbulos sanguíneos que percorrem todo o organismo do Direito, e especialmente alimentam de vida os órgãos contratuais, sendo que, em alguns, como no contrato de seguros e no de sociedade, este sangue de vida se acumula com maior intensidade, irrigando um grupo mais numeroso de vasos sanguíneos."

[773] Malberg, Raymond Carré de Malberg. Histoire de l'exception en droit romain et dans l'ancienne procédure française, Paris : A. Rousseau, 1887, p. 85-86 : Les réformes de procédure ne sont pas de celles qui s'opèrent du jour au lendemain; en général, elles s'accomplissent lentement et par degrés insensibles. Or, la théorie des exceptions s'est formée et s'est développée sur le terrain de la procédure. L'exception est née véritablement du mécanisme de la formule ; son histoire se rattache intimement à celle du système formulaire. Sans doute,

intriguing reasoning on Adolp Merkl's pure form: "*The peculiarity of the legal form must be recognized in its pure juristic nature. One should not speculate here about the philosophical meaning of the legal validity of a decision or about the motionlessness or the 'eternity' of Law, of Law untouched by time and space, as did Adolf Merkl*." When Merkl said that 'a development of the legal form is impossible because it dissolves the identity,' he disclosed that he basically adheres to a roughly quantitative conception of form."[774]

Here, Schmitt's reasoning discloses one relevant aspect of his understanding of formalisms on legal development: concealing power's exercise.

In this context, the term' exception' does not denote a loophole or an 'exception to the rule' in the usual sense but rather an extraordinary legal decision or principle that arises from a specific case or situation and then influences the broader legal framework. Therefore, as much as the rule binds, the exception also binds, conceals, and distorts the perception of authority. Parties are entitled to believe in their eternal capacity to bind themselves by their promises, but time and the rule-giver can alter the balance of those power relations, sometimes even by bypassing formalities.

The creation of Law through decision, rather than the application of pre-existing Law, reflects deeper on Schmitt's idea: the "*norm is derived from the decision, not the decision from the norm*." That statement is valid for state sovereign authority and contracts, as they cannot rule the wholeness of a relationship.

Schmitt's "sovereign is who decides on the exception" allowing for the creation of norms outside the established legal framework, also constitutes the foundation for

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lorsque la théorie des exceptions eut achevé son évolution, il se trouva qu'elle avait remué jusque dans ses fondements et transformé sur presque tous les points le vieux droit national des Romains ; mais, au début, l'exception était apparue sous la forme d'une simple innovation dans la rédaction de la formule et dans la marche de la procédure. Plus tard, le préteur, auteur de cette innovation, s'en servit pour réaliser, non plus sur le terrain de la procédure, mais dans le fond du droit civil, les réformes les plus considérables.

[774]Schmitt, Carl. Political Theology: Four Chapters on the Concept of Sovereignty [1922, translated by George Schwab], Massachusetts Institute of Technology, 1985, p. 32.

acknowledging exiting the contractual strictness to control and regulate this power through awareness of the process's occurrence. Adjudicatory processes, as history has proved, were the central stage for this development. The risk of renouncing state enforcement of laws through the judiciary also constitutes a risk for the continuity of that process promoting justice and equity through contractual relations.

In this scenario, by proceduralizing contracts[775], bilateral contracts emerged as technology recognized since the sixteenth century to transform contract law. Before this, if an unforeseen circumstance hindered the provision of services or goods, the promisor was not obliged to pay, irrespective of whether the failure was due to force majeure or intentional disregard. This was not seen as a breach, as no explicit promise had been made[776].

Even after bilateral contracts came into existence for nearly two centuries[777], the respective obligations were considered mutually independent unless otherwise specified. In

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[775] Black, Julia. Proceduralizing Regulation: Part I. *Oxford Journal of Legal Studies*, 2000, 597-614, p. 607: "Its dominant assumption is one of contest: the Hobbesian state of nature is the accepted premise of economic constitutional analysis. Politics is about strategic players, bargains, compromise. It is private: each individual is the best judge of what decisions will best serve their own interests. It rests on Kantian assumptions of autonomy, and is monological. Preferences are formed by a person exogenously, no interaction is necessary."

[776] Corbin, Arthur L. Corbin on Contracts: A comprehensive treatise on the working rules of contract law, § 1320, rev. ed. 1962, pp. 322-323: "Before the recognition of bilateral contracts in the sixteenth century, the problems of impossibility and frustration were much less complex. One who promised to compensate for services or goods certainly did not have to pay if an unexpected event prevented the service or the transfer; and no action would lie against the promise for his failure to serve or to transfer, whether his failure was caused by *force majeure* or was obstinately willful. Having made no promise, he was guilty of no breach. If after the service was rendered or the goods transferred, some event made the specific form of compensation impossible, the promisor's enrichment would have been grossly unjust if the impossibility had been held to discharge him from the duty to pay its value in money. This would be equally true in similar transactions today. For two centuries after bilateral agreements became enforceable the mutual promises, in the absence of express words of condition, were thought to be mutually independent. Failure of performance by one promisor, whether willful or caused by death or destruction, was no defense in a suit for nonperformance of the return promise; the defendant merely had a counter action, and in this counter action 'impossibility' should, in justice, be no defense. As business agreements became increasingly bilateral in character, the law of mutual independency became in conflict with the practices and mores of men. It was, after much travail, changed by the judges, a change in which Lord Mansfield played an important part, but in the wake of earlier judicial action. The change was effected largely by the method of the 'implied condition'. Long before the decision in Taylor v. Caldwell, Taylor's duty to pay rent was made conditional on his getting the use of the mush hall that he had hired from Caldwell. After this tule became established, discharging Taylor in case of failure to get the hall, whether by its destruction or otherwise, it became imperative to change the rule that Caldwell would be liable in damages for non-delivery that was caused by fire or other *force majeure*."

[777] Guarneri, Attilio. Diritti Reali e Diritti di Credito: valore attuale di una distinzione. Padova: CEDAM, 1979, p. 63-64: "Come è noto, la dottrina francese del secolo scorso ha edificato il dogma della formazione bilaterale (o plurilaterale) del contratto, per cui la bilateralità (o plurilateralità) sarebbe requisito così essenziale di ogni contratto che la semplice promessa non accettata non avrebbe alcun carattere vincolante. Tale dogma è stato

this setting, a party's failure to fulfill their promise—intentional or due to unforeseen circumstances—offered no defense against the nonperformance of the return promise. The evidence of the existential conundrum is easily perceived through all the created devices to remediate nonfeasance deployed until bilateral agreements were consolidated in the juridical landscape. Another aspect not to be disregarded was the emergence of bilateral contracts to better align with evolving business practices[778].

The implied condition through Lord Mansfield in England made certain obligations contingent on the fulfillment of others. Ensuring the fulfillment of promises and compelling parties to perform or pay damages for a long time demonstrated the state's acquiescence to the capitalistic order. State's enforcement through the monopoly of violence was a fundamental

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pervicacemente difeso tanto contro la regola legale di opposto segno, che prevede all'art. 1108 code Nap. tra i requisiti del contratto 'le consentement de la partie qui s'oblige', quanto contro una prassi che ammette, invece, con sempre maggiore ampiezza che il contratto possa formarsi anche con il silenzio tenuto dal destinatario di un'offerta fatta nel suo interesse esclusivo: così, ad esempio, Demolombe esclude in linea di principio che il silenzio dell'oblato possa essere considerato come un consenso tacito, perché occorrebbe pur sempre una dichiarazione di volontà adesiva da parte di quest'ultimo; senonché, la regola soffrirebbe un'eccezione, quando l'offerta fosse fatta nell'interesse esclusivo dell'oblato e non vi fosse da parte sua alcun motivo per rifiutarla. E questo, conclude l'autore, potrebbe essere forse una spiegazione dell'art. 1108 del *code Napoléon*, che sembra esigere il solo consenso della parte che si obbliga. Allo stesso modo, Baudry-Lacantinerie e Barde escludono la necessità dell'accettazione dell'oblato in via del tutto eccezionale, quando quest'ultimo non abbia motivo di rifiutare l'offerta contrattuale, essendo in tal caso l'offerta di tal natura da non chiedere risposta. Questa discontinuità tra dogma e regola concreta continueranno ad accompagnare la trattazione del problema nella dottrina francese."

[778] Common's core scholars collected and analyzed a massive volume of statutory, doctrinal and case law while dealing with the fundamental aspects on contractual formation. As expected, some divergences were verified among systems as diverse as the French Code Civil and American Common law. However, it also surfaced to the reader's attention how much the Roman Law teaching were embedded in both systems, even when French Law asserted an opposite precept in their conclusion and wording of the statutory provision. For instance, even if both considered unilateral an bilateral contracts as a system's category, they attributed very different effects on whether to consider performance as fulfilling acceptance criteria. For a more accurate comparison Schlesinger, Rudolf B.;Gorla, Gino; MacNeil, Ian R. et. al. Formation of Contracts: a study of the common core of legal systems, general editor Rudolf Schlesinger, Vol. II, Dobbs Ferry: Oceana Publications Inc., 1968, p. 1298:"If the offeror is indeed master of his offer, and he calls for a promise, the sophist might argue that performance by the offeree will not be deemed acceptance. American law, however, is in agreement with the General Report that complete performance, conforming to the terms of the offer and taking place before the offer terminates, constitutes a valid acceptance. American law, however, is in agreement with the General Report that complete performance, conforming to the terms of the offer and taking place before the offer terminates, constitutes a valid acceptance. This is usually explained as an 'exception' to the general rule requiring strict compliance with the terms of the offer." Whereas for the French Law, the report provides that will constitutes the key element to evaluate acceptance, according to the following, see on p. 1250: "An offer may be accepted in French law only by a manifestation of will, and this is indispensable to a meeting of the minds, the basis of the contract."

piece of a mutualistic advantageous relationship between nation-state consolidation and individual enterprise.

However, the rigidity of contractual agreements became unnecessary to ensure compliance, and the juridical mind shifted to pay more attention to the nature of the transactions individuals entered. If today could provide a picture, that would be the diminished need for state-enacted laws compared to former codification projects. The trust of parties relies on the force and mastery of contractual drafters: the masterminds of the future. However, contractual drafters and coders are not infallible despite their vital role. Much like the predictive machine of the future not yet invented their endeavors are susceptible to errors and failures.

In a certain sense, normality, rule obeying, and contractual performance erase the need for the state since it is abnormal to moan the state for rescue. If one reflects on the role of the Law, it operates by the exact mechanisms. If peace and compliance were the norm, every individual would comply without disputing power relations, the Law would not exist, and all parties would be bound to the first command. Instead, every agreement leads to a potential disputation over the rule, and authority becomes necessary to settle.

But what is the use of studying exceptional instruments applied to contract law to prove the existence of a state of exception? The evidence of such an argument requires mapping all the situations in which the disruption of contractual agreements brings into question the very nature of promises in contractual relationships, how likely they occur in a given juridical system, how the current order needs to suspend the Law to put those mechanisms into effect, and how the ontological nature of those agreements can be explained including the exception in the very heart of the enforcement of promises.

Meanwhile, the idea of absolute liability is also pernicious since it imposes on the human condition the dealing with risks of previous knowledge for events that have not yet manifested. Entrenched in English Law, that rule constitutes the other side of the risk of

unleashing promises, allowing parties to create bounds one cannot escape[779]. A bond one cannot escape is serfdom, whereas a contract from which one can always be discharged is a simulation[780]. That idea embodies a historically entrenched institution of serfdom juxtaposed with the analysis of modern contractual agreements by providing the basis for exploring the evolution of legal and societal obligations in the context of exceptions and how these elements intertwine.

Serfdom, a socio-economic structure prevalent in medieval Europe, was characterized by unyielding bonds. A serf, tied to the land owned by the lord, lived under inescapable obligations as dictated by societal norms and legal customs of the time. The inflexibility of this system, tantamount to forced servitude, offered no room for exceptions - the serf was bound to serve, irrespective of any changes in circumstance. But if one observes how contracts could hold individual's hostage of their words, which is not significantly different from imprisoning and holding them liable for eventual breaches. If the State had never surged to impose on parties the obligation to respect the given word, societies would never have left the status positions in which they were embedded[781].

Considering that the present study is mainly engaged with the flaws of the theory of absolute liability and the diverse solutions offered by different jurisdictions to mitigate the

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[779] see Ibbetson, David. Absolute Liability in Contracts: the antecedents of Paradine v. Jane, in Consensus ad Idem: essays on the Law of Contracts, in honor of Guenter Treitel, ed. by F. D. Rose, London: Sweet & Maxwell, pp. 3 -37

[780] Hatcher, John. English serfdom and villeinage: towards a reassessment. *Past & Present*, 1981, 90.1: 3-39, p. 24: "We find that contracts once entered into or arrangements once made quickly became inflexible, and frequently assumed a hereditary immutability, whether they related to the knight's fee, or the shire, borough or manorial farm. The limited term or negotiable contract, especially if it concerned land, was some thing which emerged only slowly and painfully in the context of sharply falling money values. Thus what we find in the humble world of the manor and village is but an expression of a force felt throughout the whole of medieval society."

[781] Graveson, Richard H. The movement from status to contract. *Mod. L. Rev.*, 1940, 4: 261. pp. 263-264: "Even in feudal times methods of dealing with land were being quickly evolved; and attempts were being made by contract to vary or discharge the incidents of status. The commutation of villein services into rent, particularly after the Black Death, and the movement towards enfranchisement of villein, and later copyhold, land was indeed a movement from status to contract, though hardly in the sense intended by Maine. In later centuries a continuation of this movement was in favour of nineteenth century individualism ;…*The importance of status decreased as, by the fifteenth century, estate came to be regarded as property, not as a status.*

flaws caused by such an approach, Paradine v. Jane, even though constituting the landmark of absolute liability, signified a step ahead from the weight of a pure status approach to lead and to contractual arrangements[782].

Contractual agreements in contemporary legal practice embody opposite principles. They signify mutual consent between parties who engage as equals under the Law. While contracts do impose obligations, they inherently recognize the concept of exceptions. Parties to a contract are always entitled to be discharged from these obligations under various circumstances - contract breach, a mutual agreement to dissolve, or other legal allowances for termination.

In this regard, the contract serves as a 'simulation.' It creates a dynamic, adaptable framework of obligations designed to mirror rigid bonds of one's word but with the added dimension of flexibility. They accommodate the principle of exceptions, allowing contractual terms to be adapted, renegotiated, or even dissolved in response to changing circumstances. Serfdom, contracts, and the notion of exceptions uncover a critical evolution in societal and legal norms - from the unyielding bonds of serfdom to the fluidity of contractual agreements.

The exception, as a concept, transforms from a non-existent notion in serfdom to a vital part of the contractual machinery, reflecting society's move from rigid obligations to dynamic, negotiable commitments[783]. The contrast uncannily exposes the significance of exceptions in

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[782] Havighurst, Harold C. The Nature of Private Contract,1961 Rosenthal Lectures, Littleton: Fred B. Rothman & Co., 1981, pp. 19-20: "In the nineteenth century under the influence of the classical economists, freedom of contract becomes a sacred thing. Over a period of several centuries to thinking men contract is not simply important; it is everything, or at least everything that is good. 'The definition of injustice' said Hobbes, 'is not other than the not performance of Conventant.' The tendency to ascribe to contract an all-embracing role is insidious. The Pollock and Maitland passage from which I quoted continues and concludes with the sentence: 'The idea that man can fix their rights and duties by agreement is in its early days an unruly anarchical idea. If there is to be any law at all, contract must be taught to know its place'."

[783] To refresh the hostage's sacrifices in the previous chapter Hazeltine, Harold D. Formal Contract of Early English Law. *Colum. L. Rev.*, 1910, 10: 608. The author alludes to the *god-borh* promise, a formal contract from the Anglo-Saxon period that, according to the author, is "to be viewed as a particularly solemn kind of formal promise. The debtor, by his solemn promise, binds himself and himself alone directly to the creditor: he provides no earthly sureties, but he calls upon God to be his surety for the faithful performance of his contract with the creditor. In this form the contract is of course strikingly like the promissory oath and the pledge of good faith." The noteworthy aspect of this passage is the historical evolution of contractual Law in Anglo-Saxon England, tracing the transition from suretyship, where a third party assumes responsibility if the

maintaining a balance between social order and individual autonomy[784], serving as a powerful reminder of the continual evolution of legal and societal structures.

That aspect of medieval contractual arrangements uncovers why contractual obligations were so tied to a minimal margin for adjustment, given that the preceding forms of societal ties were the land and even more restricted to the attachment to the land, serfdom, and villeinage.

On the other hand, a contract is a tested experiment in which parties behave as if they are in a hermetic environment of conditions that can be situationally reproduced, and it is not susceptible to unpredicted changes. By drawing a comparison between the rigidity of old real property rights and contractual forms, the inability to anticipate the future constituted a vital aspect of the formality of contractual obligations and the perennial nature of relationships formed based on a very limited exercise of will. Historically, visiting the events that caused significant societal disruptions is worth mentioning. The black plague eliminated more than 50 million people in Europe. Wars swapped the continent, and the unknown was the certainty of those communities that restricted their livelihoods to the limited territories they could afford a

principal debtor defaults, to self-suretyship, where the debtor solely binds themselves to fulfill the contractual obligation. This transformation expanded the role of formal contracts beyond specific cases like feud settlements and marriages, making them a universal tool for legally binding promises. This illuminating article on the legal history of contracts underscores the shift towards self-suretyship and introduces the concept of God-suretyship, where God serves as the surety. It evidences the significant roles of formal contracts in Church law for preserving peace, to which those ancient communities attributed liability as formal contracts result, positing personal and property liability theories.

[784] Santner, Eric. My Own Private Germany, Princeton: at University Press, p. 145: “Schreber’s cultivation of an ensemble of ‘perverse’ practices, identifications, and fantasies allow him not only to act out, but also to work through what may very well be the central paradox of modernity: that the subject is solicited by a will to autonomy in the name of the very community that is thereby undermined, whose very substance thereby passes over into the subject. Schreber’s phantasmatic elaboration of that paradox allows him to find his way back into a context of human solidarity without having to disavow this fundamental breach of trust, without having to heal it with a ‘final’ and definitely redemptive solution.” Daniel Paul Schreber was a German judge and a notable figure afflicted by a severe mental illness that gave rise to one of the most intriguing testimonials of mentally impaired minds affected by paranoid schizophrenia. As his importance is largely recognized in psychoanalytical circles, his juridical training inspires an understanding of the law and its investiture crises, which Eric Santner explored in his analysis of Schreber's case. He was born in 1842 and died in 1911, offering a valuable picture of the juridical scene of his lifetime. His book, "Memoirs of My Nervous Illness" ("Denkwürdigkeiten eines Nervenkranken"), published in 1903, was an account of his experiences of profound mental disturbance and his nerve interactions with a structured and ordered system that others could not access.

minimal level of safety with the cost of restricted freedom. In that given order, they could only count on the *Acts Of God*, as the doctor and the student stated[785].

But before continuing to scrutinize the available remedies and instruments in different legal systems to cope with the exception, it is worth pointing out why someone would assume such a task in the sense of what this research can contribute to forming a broader claim on the subject of the exception in Private Law. Nonetheless, the advantage of closely analyzing those institutions is worth the effort in times of uncertainty. First, it helps better to understand the flexibility and resilience of existing legal frameworks when faced with unforeseen or extraordinary circumstances. Examining how Law adapts to such situations can reveal its inherent capacities to cope with crises, highlighting the Law's ability to evolve and remain relevant in changing circumstances.

Second, such a study can expose potential gaps or inadequacies within the legal system. If conventional legal tools fail to provide just and equitable solutions in an exceptional context, this might indicate areas where the Law needs to be strengthened, clarified, or reformed.

Third, these explorations might uncover or foster the development of new legal theories or principles.

Exceptional situations often require subversive discipline to deal with them[786], an attribute that Comparative Law does not lack. The advantage of Comparative Law, as George Flecther acknowledges, is the one that "*expands the agenda of available possibilities."* And even though International Law somehow plundered Comparative Law by depleting the reasons for deploying a comparative method within a constrained parochialism, it also indulged the

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[785] Hobbes, Thomas, A dialogue between a philosopher and a student of the common laws of England reproduced according to the Molesworth 1840's edition The English Works of Thomas Hobbes of Malmesburyr, in Testi per La Storia del Pensiero Giuridico, con un studio introdutivo di Tullio Ascarelli, Milano: Giuffrè, 1960, pp. 74-230. In the fashion of Saint German's dialogue, Hobbes brings illuminating reasonings on the nature of agreements.

[786] Fletcher, George P. Comparative law as a subversive discipline. *Am. J. Comp. L.*, 1998, 46: 683. See also Hug, Walther. The history of comparative law. *Harv. L. Rev.*, 1931, 45: 1027.

very nature of the subjecting conducting comparison. The difference in the quality of the comparison performed by an Internationalist and a comparatist resides in the comparatist's awareness of the impossibility of their task, regardless of whether covered in a neutral aspiration of enabling borrowing, harmonization, or functionality.

On the other hand, the Internationalist operates the same material as the comparatist and tends to absorb inclinations driving legislative purposes. If consensus is found among the players, legitimated to celebrate treaties, they will overlook the divergences in favor of holding the authority from an international command, here adopting Hart's rule of recognition precept. The comparatists, once unsuccessful in harmonizing Private Law, for instance, satisfied themselves with the much more herculean task of pointing out the inconsistencies and bigotries of their juridical landscape. By reading comparatists, one becomes aware that most are accomplished in disciplines ranging from legal history to Law and Economics, portraying the Law with enthusiasm not seen since the great hopes at the turning of the XX century. However, delusions always accompany the convergent/divergent paths one may encounter. Even though society bears the same emotions and drives, it should also obey principles oriented in those elements. However, aspirations and behavior do not correspond, and different jurisdictions demonstrate a greater or lesser tendency to concede.

Moreover, legal strategies are developed to manage the unforeseen, culminating in strengthening the Law since it constitutes an oracle of future events, either by anticipating it or shaping individuals with its *ought* pursuit. Finally, studying how contract law is applied during a state of exception helps build a body of precedent. This, in turn, can guide future legal responses in similar exceptional circumstances, providing clearer guidance for legal practitioners and those whose rights and obligations are shaped by contract law.

In a recent Revue des Contrats issue, Xavier Pernot posed two valuable scenarios to be considered after the French Code reform. The first result of drafting force majeure contractual

provisions to regulate its effects, and the second is whether legislators should limit force majeure events. For both, the author questions the feasibility of the parties' anticipation of unforeseen circumstances by asking:

> *"Cette volonté de restreindre la liberté contractuelle et l'adaptabilité du mécanisme de la force majeure au nom de la sécurité juridique ne nous paraît pas souhaitable. En effet, l'imprévisibilité est au cœur du concept de force majeure, elle en constitue même l'une des raisons d'être. Or, énumérer limitativement les cas de force majeure revient à fermer la porte aux événements qui, demain, seraient véritablement imprévisibles. Quel serait encore le sens de la notion de 'force majeure' ? »*[787]

Doctrinal reformulation of *force majeure* in French civil is justified under the revamping of former provisions. The French solution to *force majeure* events was based on the "all or nothing" grounds. The debtor would walk free from the contract or denied impossibility to perform, regardless of how onerous such performance would become[788].

With the Code of Civil Reform, that model resembled the murky German approach in the sense of the multiple possible shades of *imprévision*. According to the new French provisions, they could be total or partial, permanent or temporary. These changes allow contractual clauses to become fluid as the distinction leading to complete impossibility and onerosity occur varies to the observed jurisdiction[789]. The French reform engaged in a vaster dialogue that encompasses article 79 of the CISG (The United Nations Convention for the

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[787] Pernot, Xavier, La force majeure : fonctionnement et destinées, Revue des Contrats, 1 :2023, 175-177, p. 176.

[788] Beale, hugh. Fauvarque-Cosson, Bénédicte, RUTGERS, Jacobien and Vogenauer, Stefan. Cases, Materials and Text on Contract Law, 3rd ed. Oxford: Hart Publishing, 2019, 28.1, p. 1171: "A distinction is drawn between circumstances or events which render the performance of the contract impossible and those which merely make it more difficult or onerous. The position of French law on this question used to be clear-cut it was all or nothing. Either there was total impossibility, and the debtor was freed on the ground if force majeure (fortuitous event) or else he had to perform the contract, however onerous its performance had become. The new Code civil now recognizes both impossibility (force majeure) (Article 1231-1,1351) and *imprévision*, which means that the judge is given the power to revise or terminate the contract if it has become excessively onerous for one of the parties and the parties are not able to agree on an adjustment (Article 1195 Cciv). German law distinguishes various categories of impossibility and also allows the courts to adapt contracts on the event of change of circumstances. In English law, impossibility of performance includes the notion of that which renders the contract 'something radically different from that which was in the contemplation of the parties', which arguably goes further than *force majeure*. However, unlike French and German law, English law does not allow the courts to adapt contracts in the event id change of circumstances."

[789] Beale et al. p. 1172: "In practice, the distinction between the circumstance or events which render the perfomance of the contract impossible and those which merely make it more difficult or onerous is fluid."

International Sales of Goods), as well as the Draft Common Frame of Reference (DCFR), and the UNIDROIT Principles of International Commerical Contract (UNIDROIT PICC). Impossibility and *force majeure* transit in zones of indistinction as impossibility constitutes a condition for recognizing *force majeure*. However, being *irresistibility* a requirement for assessing *force majeure*, it surfaces how intertwined force majeure and impossibility is since force majeure contains impossibility on it[790].

And in the realm of exceptions, the French Code becomes once again the emblem and the closing of a circle on why codification appeared and will be relinquished. Article 1218 1804's version stated that:

> *"L'obligation est indivisible, quoique la chose ou le fait qui en est l'objet soit divisible par sa nature, si le rapport sous lequel elle est considérée dans l'obligation ne la rend pas susceptible d'exécution partielle."*

The reformed version provided:

> *"Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur. Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1."*

Even though the for the application of *force majeure* the vanished French notion of cause does not appear, the underlying idea is still fundamental since, as Prof. Gordley alludes[791], the borrowing of Aristotelian principles of causes lead to the conclusion that the reason for admitting excuses to the absolute nature of promises relies on the disappearance of the reason for admitting an enforceable naked pact. For the provision's interpreter, some rules might give the impression that cause is an inexistent problem, as it happens in the German

[790] Beale 28.3, p. 1174.

[791] Gordley, James. The philosophical origins of modern contract doctrine. Clarendon Press, 1991, p.49 : « As we shall see, in all likelihood Bartolus and Baldus formulated the doctrine with this distinction in mind. Nevertheless, they were not attempting to explain Roman law systematically by Aristotelian principles. They merely found Aristotle helpful in interpreting their Roman texts. One key text stated: 'When there is no causa, it is accepted that no obligation can be constituted by an agreement; therefore a naked agreement does not give rise to an action although it does give rise to a defence (*exceptio*). »

regime, but is precisely the disappearance of that correspondence from the initial moment of the celebration and the supervening circumstances that prevents contractual continuation since the reason why a party must bind themselves to a given promise becomes inexistent.

The notion of *aequitas* is deeply related to the clausula *rebus sic stantibus*, and after conducting an extensive reading[792], one might conclude that the doctrine of *causa* was a rationalization of a justice concern that pervaded the system, Therefore, all the theory falls apart when the expectations do not match reality, searching for more complex justifications for why promises should not be kept.[793]

The legal interpretation infers that only Acts of God events recalibrate human arrogance in its presumed ability to predict all outcomes. Humanity's progressive stride in advancing civilization denotes a degree of liberation from the intrinsic material conditions and dependence on the natural order[794]. From the primordial times when humankind harnessed fire

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[792] Meijers, E. M. Etudes d'histoire du Droit, tome IV – Le Droit Romain au Moyen Age, Leyde: Universitaire pers Leiden, 1966, p. 41 : « la clausula rebus sic stantibus ou la clause de déchéance tacite accomplit son rôle historique dans le droit civil. Elle a donné des résultats utiles à une époque où le juge s'estimait incompétent pour refuser en vertu de l'équité l'application du contenu de la convention à des situations imprévues et inhabituelles. Elle présente peut-être encore cet intérêt dans les pays où cette compétence fait défaut au juge. » The reading of authors writing on the same object across jurisdictions allows the research to capture the sprit of exception's existence, the reason why contractual sanctity is not sustainable as a doctrine without the influxes of equity. Palermo, Antonio. Studi sulla "Exceptio" nel Diritto Classico. Dott. A. Giuffré Editore: Milano, 1956, p. 88: "L'excpetio servì così ad introdurre nel campo del diritto sostanziale e processuale nuovi istituti e nuove regole di diritto attraverso la tendenza al rispetto dell'aequitas, di cui l'organo giurisdizionale si fece vivo interprete. Tendenza che non rappresenta soltanto um temperamento della legge nel caso singolo, imposto da ragioni di umanità e benignità, ma costituisce una esatta applicazione di norme giuridiche appartenenti a diversi sistemi, combinate nel caso di specie al fine di assicurare la soluzione giusta nel senso più moderno della parola. Ma accanto a questa funzione positiva la exceptio svolse anche una funzione negativa, intesa quest'ultima nel senso di difesa del convenuto (defendedorum eorum gratia cum quibus cum quibus agitur) che si concreta nel per exceptionem repelli nei confronti dell'attore."

[793] McElroy, Roy Granville. Impossibility of Performance: a treatise on the Law of supervening impossibility of performance of contract, failure of consideration, and frustration, ed. With additional chapter by Glanville L. Williams, Cambridge: at University Press, 1941, p. 17 on exceptions to 'absolute' promises.

[794] In that sense *Oikonomia* transcends the disciplinary sense physiocratic given. See Markus, Robert Austin. Trinitarian Theology and the Economy. *The Journal of Theological Studies*, 1958, 89-102, p. 93: "The gnostic usage of *οἰκονομία*, as portrayed by Irenaeus, is strikingly close here to Irenaeus's own in texts where he is not directly concerned with heretical teaching. In both kinds of context, the 'economy' is the medium of human history, in space and time: which in the Christian redemption-history is the divine 'dispensation' if grace." The author highlights the intriguing similarity between the Gnostic usage of *οἰκονομία* and Irenaeus's own application of the term, particularly in contexts unrelated to heretical teachings. Markus emphasizes that, for both Gnostics and Irenaeus, οἰκονομία represents the medium through which human history unfolds in space and time. This shared understanding of οἰκονομία underscores its importance as a key concept in Christian redemption history, where it serves as the divine 'dispensation' of grace.

to conserve and utilize energy resources to the establishment of societies grounded in agriculture, humans have persistently sought to subjugate and govern the unknowable elements.

However, the unknown retains an innate ability to astonish those vested with the responsibility of implementing rules and regulations. This lack of perfect foresight is why legal principles and instruments are developed, not to predict every facet of the future but to provide a consistent framework for action and decision-making when the unpredictable occurs. For no other reason, the oracles were a source for providing consistency and acceptance of the impossibility of unanticipated aspects of the future. Recognizing this limitation, the sages of the Law sought to instill consistency and concede the inherent omniscience's incapacity.

Whenever scholars devise an idea to fix an element bringing excessive rigidity to the Law, another one is exposed, as if perfection can never be achieved. For a while, contracts forming obligations and property based on individuals will constitute tokens ensuring a peaceful unveiling of the future. Natural Law sought a model resembling the perfection of divine laws, as they would command and bind what is below. Instead, they found how inoperative the inspirations were to regulate human drives.

IV. Conclusion

Before the idea of exclusion, the suspension of normality pervaded state’s regulation, observed the difficulty of including the unforeseen in legal provisions and contractual drafting, it must be said that the basis of exception in Private Law precedes the issue of all-situations-embracing rules since to find that balance is a problem of logic. The ideas surrounding a public body to regulate community are relatively recent in the conformation of the Sovereign emerged

after the Peace of Westphalia and can be situated in the writings of Bodin, Suaréz[795], and other scholars that were claiming for the Public what was once run by the church and the local lords.

The evolution of human society has seen us progress from tightly knit clans through vast kingdoms and into the modern concept of nation-states. As these social constructs have grown and evolved, they have increasingly lost their tangible nature, moving from immediate physical communities to abstract, remote entities. The bedrock connecting these societies have also transformed, becoming less about the blood ties of birth and more about intricate systems of laws and contracts, as suggested by scholars' account of social evolution[796].

In the contemporary world, a further shift occurred with the advent of the internet. The vast global network has furthered the growth of non-territorial communities, bringing parties together regardless of their geographical location. However, the absence of a comprehensive legal structure within these communities has often led to unresolved disputes on which jurisdiction cannot claim authority. The difficulty in situating not only the authority controlling contractual rules but also who is the adjudicator of those disputes constitutes a nodal point of suspension. The Roman sources enabled the state to invoke the structure of Private Law to emerge as central state-enforced provisions started to erode, following the same path that reclaimed the state intervention over the biological level of life for its subjects as the last frontier by which control could be exercised. This idea might seem detached from the current situation since courts decided cases, states regulated contractual provisions, and the covid pandemic demonstrated the essential role of centralized authority in reestablishing normality in the chaos.

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[795] Lorenz, Philip. *The Tears of Sovereignty: Perspectives of Power in Renaissance Drama*. Fordham Univ Press, 2013.

[796] Even a jurist who produced extensive literature on Private Law and the First World War wrote on the implications of social evolution theories. See Cogliolo, Pietro. *La teoria dell'evoluzione [darwinistica] nel diritto privato*. Savini, 1882.

If the state of exception in the Law is strictly considered as suspension and the incidence of martial Law enacted by a ruler who did not receive such a mandate, finding the intersection between civil procedure exceptions and the abnormality of the state heading towards the erasure of a previous order becomes impossible. However, for the sake of exercising and playing with words, we locate the exception in challenging the norm with its voids. Where parties are not heard, and the dispute does not conform with the preestablished legal order, we find a place where meanings disregard the entrenched division of public and private. The substantive manuscripts rediscovered as scholars were gripping with finding linearity of the past heritage of the Roman tradition turned out to be concerned with how parties present disputes, how formulas are introduced and contested, and how the legal mind could twist equity into the emerging legal tradition.

Nevertheless, adjudication was essential for advancing those exceptions into rules and balancing Law's elitist vocation to accomplish equity pursuits. With the disappearance of judicial adjudication at the same time, former exceptions once absorbed into substantive Law are erased, and it becomes inevitable to enter an ambiguous order in which compliance relies on expected outcomes for the winners, making the losers progressively deposit support for regimes uncoerced to implode legal order's entirety.

The exceptions on civil litigation consist of the public structure enabling parties to battle for public endorsement of private order relationships.

It was precisely the mobilization effort concentrated in the state that offered the perfect disguise for the unprecedented shift of wealth and assumption of control from subjects escaping Sovereign's power. The most impeccable way to achieve goals outside public attention is by stressing how the state is strong and how a private order is an inconceivable reality. However, paying attention to details, including how to read contracts, denounces that Private Law is in

the verge of collapse[797]. Public Law does no longer offer a threat to Private Law's existence[798]. The present threat arises from private ordering, coding the Law, and the shift from state adjudication in every department of the legal field. As Esposito has been signaling for decades, the biological zōe encroached on legislation, living as a result the commoditization of every other aspect of existence[799].

The present era has done more than merely unleash an uncontrolled Leviathan; it has given license to artificial entities to govern the world as sovereign powers, a trend that will only escalate with time. As Tom Bell suggests, the world no longer resembles a coloring book where each patch of territory is attributed to a specific country[800]. Although the arguments put forth by Bell challenge many of the traditionally mandated powers of the state, particularly the authority to maintain a monopoly on violence, contracts as tools of regulated violence are integral to the function of the state. These contracts deter the creditor from taking extreme

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[797] Resnik, Judith. "Diffusing disputes: the public in the private of arbitration, the private in courts, and the erasure of rights." *Yale LJ*, vol. 124, 2014, p. 2804. Werbach, K.; Cornell, N. "Contracts ex machina." *Duke LJ*, vol. 67, 2017, p. 313. And also Posner, Richard A. "The decline of law as an autonomous discipline: 1962-1987." *Harv. L. Rev.*, vol. 100, 1986, p. 761.

[798] de Almeida Ribeiro, Gonçalo. *The decline of private law: A philosophical history of liberal legalism*. Bloomsbury Publishing, 2019. p. 111: "I hope my point is not misunderstood. We do not believe that from the premises of the will theory of contract it is possible to derive an entire set of rules concerning defences, or indeed any truly operative rules. When we read the legal treatises of the nineteenth century with the benefit of hindsight, the efforts to work out the will theory in detail often look silly, and indeed pernicious. The fact, however, is that they experienced very abstracts concepts as fully operative and sought in them criteria to articulate entire bodies of legal contract. Their divergences took the form of analytical disputes, concerning who is getting the concept right or applying it correctly to a fact pattern. From the standpoint of the (mainstream) participants in nineteenth-century legal thought, the question of which defences are available to the parties is thus deductive in nature; similarly, Kant experiences the concepts of contract and ownership, for example, as having a high degree of operative force."

[799] Esposito, Roberto. *Terms of the Political: community, immunity, biopolitics*, translated by Rhiannon Noel Welch. Fordham University Press, 2013. p. 87: "A glance at the panorama that inaugurates the beginning of the twenty-first century is enough to give us a striking picture: from the explosion of biological terrorism to the preventative war that attempts to respond to it on its own terrain, from ethnic—that is, biological—massacres to the mass migrations that sweep away the barriers that are intended to contain them, from technologies that invest not only individual bodies but also the traits of the species to psychopharmacology that modifies our vital behaviors, from environmental politics to the explosion of new epidemics, from the reopening of concentration camps in different areas of the world to the blurring of the juridical distinction between norm and exception—all of this while everywhere a new and potentially devastating immunitary syndrome breaks out once again, uncontrollably."

[800] Bell, Tom W. "Ulex: Open source law for non-territorial governance." *Ulex: Open Source Law for Non-Territorial Governance*, vol. 1, 2020.

actions against a hostage or a debtor in case of a breach, thereby ensuring the state can effectively execute its liabilities.

Therefore, why is *l'état de siège* not part of the Private Law discourse? Not because it does not exist, but since democratic consent escapes the expectations of parties entering agreements, erasing the exercise of control of private agreements allows for rearranging the regime disregarding entire constructions. The loss of state adjudicatory role is fundamental for understanding the degeneration process[801]. Meanwhile, the separations of doctrinal works and the functioning of state courts created a lapse that will be late when attempted to be overcome.

In the rigorous terms of legal definitions, the *exceptio* of Gaius Institute and the Digest does not necessarily correspond to the multitude of exceptions to the rule that arose in the world's different legal systems[802]. Even though the theory that attributes to the exception a counter-right character still fulfills the expectations on substantive grounds, basing the reason for defenses in a counterclaim, the scholars who moved the theory of defenses further in time were Italian scholars preoccupied on how to include those exceptions in the emerging civil procedure theory, followed by the Germans who accomplished a similar task by tuning to the Roman sources. To the English mind and their common law counterparts in general, the reasoning surrounding the existence of procedural exceptions does not harmonize with the common law origins in the system of writs and its respective remedies. However, for the theory

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[801] To some extent anticipated by Beale, Joseph H. "What Law Governs the Validity of a Contract." *Harv. L. Rev.*, vol. 23, 1909, p. 79.

[802] Fontanelli, Filippo. "The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin." *Cambridge J. Int'l & Comp. L.*, vol. 1, 2012, pp. 119-123: "*To sum up, in modern legal practice, the exception of non-performance can be characterised as follows: a refusal to perform by one party which would be objectively wrongful under the terms of the contract may be lawful in light of the previous conduct of the other party. The power to avail oneself of the exceptio non adimpleti contractus boils down to the possibility to adopt conduct in violation of the contractual commitment and to invoke the other party's non-performance together with the evidence proving it as a justification for non-performance. 6 It is reasonable to rely on the findings of those who have performed a full comparative analysis, and submit that this principle of the law of contracts is indeed traceable in most modern legal orders.*"

amalgamated between the Italian Civil procedure scholar and the German Pandectists[803], the distinction was central for providing an abstract right to action independent from the claim in substantive Law itself. In that regard, the separation of exceptions in procedural and material constituted an essential threshold for arguments seeking to dismiss the plaintiff's claim or the right in itself, preventing the claim from ever being presented again. In reality, such an exception touches the kernel of the right since it voids the plaintiff's capacity to reappear in court with the same claim.

On the other hand, the defenses fulminated the right presented by the plaintiff. The exceptions preventing the pleading from being admitted by the court assumed the peremptory and dilatory exceptions object of the study of civil procedure. The Roman *exceptio* was incorporated in a diachronic relation in the adjective Law in such a development that when remedies for frustration are approached in the study of force majeure and unforeseen events, the connection between the state's adjudicatory role as the authority to validate economic regulation on trial disappeared[804]. The public shaping of the right of action, the German *Klagerecht*, and the right to action embraced in the continental tradition presupposed a functioning state as the arbitrator to decide against whom violence should be enforced. A similar trend was embraced in the American civil procedural framing,

Civil Procedure constitutes the last missing piece to assemble the puzzle of the exception. The state is still the lawgiver of substantive rights since no rights exist outside the

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[803] Savigny attributed to the cited passage of the Digest that "we must never sacrifice to the love of it (regula) any otherwise independently established concrete determination. Here therefore is the place for the recognition of exceptions by the side of the rule; indeed what we here call exceptions, is really only the recognition of an incomplete expression' of the rule. Legislative declarations expressed in the form of general rules, have a different nature and in these, we must be more sparing in the permission of exceptions." System of the Modern Roman Law, tr. Eng. By William Holloway, Madras: J. Higginbotham, 1867, p. 38: "Even in early times the Roman jurists sought to lay down for use in many jural relations, general formulas, which became rooted by tradition and obtained great and lasting respect; Gaius in particular has preserved for us many of these; but the jurists themselves and Justinian in their words, remark upon the danger of an indiscriminate submission to those formulas and point out that their purpose is the summarizing of the law and concentrating its contents but that they ought not to be regarded as bases of law."

[804] Kens, Paul. *Lochner v. New York: Economic Regulation on Trial*. Landmark Law Cases & American, 1998. p. 111.

legal framework provided by the state or by contractual disposition. Even the natural rights and innate rights doctrine presupposes the state's existence to be enforced or to hold the state accountable in the international arena when it constantly violates those rights. A contract lacking the assurance that the promises contained there will be enforced by free will or the sword of the state is a blank piece of paper or a mere dialogue. Jurists traveled long to conciliate individual freedom and the imposing sovereign presence by tearing the many legal variations into pieces to compose a new figure that could blend the individual and the state.

The degradation that sovereign authority endured with the emergency of corporations and the like opened a disturbing void between rights and the avenues for proposing claims and counterclaims. With the expansion of private adjudication through arbitration and the like, great confusion arose, in which the civilists still believed that the Law functions as stated in legal provisions[805].

In contrast, branches outside the state operate a different device that no one dared to attribute a name, so diffused and disturbing the phenomena is. When contractual Law embraced will theory, it abandoned equitable and operative concerns to other disciplines. Furthermore, with the impact of the great wars reclaimed part of its justiciable role, mainly with the government's need to regulate private activity, it was inevitable to rescue those institutions that migrated to civil procedure in their original conformation: that of granting the opposite party the power to oppose the injustice of performing the contract[806].

A retrospect of how naked pacts became enforceable requires approaching the strictness of contractual forms[807], the available formulas, and the respective defenses. After one accepts

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[805] Lando, Ole. "The lex mercatoria in international commercial arbitration." *International & Comparative Law Quarterly*, vol. 34, no. 4, 1985, pp. 747-768.

[806] Schlegel, John Henry. "Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things-The Doctrine of Impossibility of Performance." *Rutgers L. Rev.*, vol. 23, 1968, p. 419: "Perhaps no part of the law evokes the spirit of Alice more readily than the law of impossibility of performance of contracts."

[807] Simpson, A. W. B. *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*. Clarendon Press, 1975. p. 5: “The medieval common law was a formulary system, whose content and basic structure were determined, to a very considerable extent, by the catalogue of original writs in the Register. In so far as it was possible to bring contractual actions in the common law courts, the possibility depended upon the existence of

that the original language of the Law was very sophisticated and that this system's simplicity is replicated today through smart contracts, the logical conclusion is that on the contracting party's fingertip, there is a *festuca* vesting the agreement not with will but with formality. The difference is that formality sacredness was substituted for cyber-formality.

The Roman origins of exception opened for the defendant were defined by Gaius as protection for the defendant, and it evolved from jus honorarium to protect the defendant in the limited scope given the seriousness vested in the contractual venues available for the parties[808].

Gaius Institutes book IV stated that *"§ 116. Exceptions have been established for the protection of the defendant, as it is often the case that a person is under a liability by the civil law when justice forbids his condemnation*."[809]

And even though centuries separate the Roman doctrines of exceptio from the modern exceptions and defenses[810], some common grounds persist, resonating if not in a linear theory of defenses, at least as an epistemological chain of values ingrained in the exclusion paradigm[811]. Before they were interpreted as preliminary defenses that bar claims, their study

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a suitable form of action. Inevitably the way in which medieval lawyers thought about contract law was very powerfully influenced by the formulary system with which they worked, and which provided them with their categories. We must not expect to find them thinking of their law of contract in the same way as we think of our law of contract; in the course of centuries very considerable changes have taken place in the ways in which consensual transactions are classified, analyzed, and named."

808 D. 50.17.1 "Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis rerum narratio traditur, et, ut ait Sabinus, quasi causae coniectio est, quae simul cum in aliquo vitiata est, perdit officium suum. " Translated: A rule is a statement, in a few words, of the course to be followed in the matter under discussion. The Law, however, is not derived from the rule, but the rule is established by the Law. Hence, a short decision of the point in question is made by the rule; or, as Sabinus says, a concise explanation of the case is given, which, however, in other instances to which it is not applicable loses its force." Available at "Digesta Iustiniani: Liber 50, Mommsen & Krueger". *Droitromain.Univ-Grenoble-Alpes.Fr*, 2023, https://droitromain.univ-grenoble-alpes.fr/Corpus/d-50.htm#17. Accessed 20 July 2023.)

809 Zulueta, Francis de. *The institutes of Gaius, by Gaius*. Clarendon Press, 1958. Language English, §§ 115-19, pp. 280.

810 Ritter Von Bechmann, August. *Der kauf nach gemeinem recht*. A. Deichert, 1876. p. 569. The evolution of "exceptio non adimpleti contractus," constituting a principle enabling one party to withhold their contractual performance if the counterpart has not yet fulfilled their obligations, makes the author contends that this principle evolved not merely for the buyer's benefit but from the seller's distinctive position, highlighting inherent reciprocity in contractual obligations.

811 Ulpian in D. 44, I, 2 translated as the following "An exception is so called for the reason that it operates as an exclusion, and is ordinarily opposed to proceedings to collect a claim, for the purpose of barring the statement of the same as well as judgment in favor of the party who brings the suit." "44.1.2 Exceptio dicta est quasi quaedam exclusio, quae opponi actioni cuiusque rei solet ad excludendum id, quod in intentionem

was an object of recognized legal scholars, from Carnelluti to Chiovenda and Calamandrei, to cite a few Italian names that drove the theory to be adopted in the ongoing codification movements. In some instances, raising an exception constituted the only available way to raise issues that otherwise could not be brought for judicial appreciation. Those issues are raised through exceptions compromising the success of a claim and favor the defendant or, if they are not occupying the adversary side, benefit the party presenting it. The rigor by which those counterclaims were presented disappeared once they were incorporated into the adjective law, allowing the party to be excused from the burden a victorious claim would impose[812].

It is noticeable that even though the discussion gravitates around the right to exercise the right to action, by the same time the doctrine of Private Law was creating the theories to deal with frustration, assuming the responsibility to address the exceptions contained in the system within the substantive side. The codification movement was a driver the accelerated pace by which each discipline would evolve since every discipline sought to achieve the level of recognition for being independent and self-sufficient by itself. Private Law was vested with the substantive exceptions as rights to be exercised on either side of the lawsuit considering that the procedural right to action also conquered its autonomy as a subjective right to be exercised against the state. Even disciplines within the Private Law umbrella gained similar autonomous advantage. One example was Commercial Law, detaching from Civil Law to vest

condemnationemve deductum est." "Digesta Iustiniani : Liber 44. "Mommsen & Krueger ". *Droitromain.Univ-Grenoble-Alpes.Fr*, 2023, https://droitromain.univ-grenoble-alpes.fr/Corpus/d-44.htm#1. Accessed 20 July 2023.

812 The amalgamation surrounding conflicting concepts became evident when Windscheid and Muther engaged in a dispute over the nature of the right of action here brought to life by Chiovenda, Giuseppe. Saggi di Diritto Processuale Civile, 1900-1930, Vol. I, Roma: Società Editrice Foro Italiano, 1930, p. 9: "L'indirizzo di tale ricercar à forse spiegato dalle polemiche allora accese sui diritti pubblici subiettivi (da poco era uscito il libro del Gerber); dallo stesso concetto insito al Klagerecht, sopra adombrato, e certo dall'idea che il diritto subbiettivo presupponga necessariamente un *obligatio*. Muther giunse così a concepire il diritto d'agire come un diritto verso lo Stato nella persona dei suoi organi giurisdizionali, come un diritto alla formula, o per noi, alla tutela giuridica: a questo diritto subbiettivo pubblico, che ha per presupposto un diritto privato e la sua violazione, corrisponde nello Stato non solo il dovere verso l'avente diritto d'impartirgli la tutela, ma ancora un suo diritto subbiettivo, pubblico s'intende, di spiegare contro il privato obbligato la coazione necessaria per ottenerne l'adempimento de 'suoi obblighi."

titles of credit from business activities with autonomy and self-executability, which means not relying on the judicial process as civil claims. Codification made independency a necessity for every discipline, and it was not possible to be diverse for Private Law, especially in the continental traditions enduring the codification effects.

This effect was perceived in the changes to accommodate the astonishing speed of societal changes. The wars, the overreaching effects of the state as the grantor of rights, the new theories transiting between forms and substances.

This idea has endured and still resonates in modern legal systems. For example, in both civil and common law systems, a party can raise defenses to a claim that essentially exclude them from liability, similar to the Roman law concept of "*exceptio*". It could be argued that modern doctrines such as force majeure, imprévision, frustration, and others are descendants of this idea. These doctrines allow a party to a contract to escape from their obligations when unforeseen events occur that make performance of the contract impossible or excessively burdensome. Nonetheless, to achieve that objective, the state must be present settling the dispute, reallocating parties loses.

As the labyrinth of exceptions, defenses, and contractual dynamics across a plethora of legal systems is overcome, it is unavoidable to walk into a razor's edge. On one side is the *ius commune*, a return to the shared law that binds together a divergent set of interests and goals, forging a legal fraternity, an echo of legal cultures intertwined and universalized. On the other side yawns the abyss of the dissolving state, a testament to the ceaseless churn of political and economic power structures, where rights shrink into the shadows and exceptions reign in a scarce landscape dominated by a few behemoths. When someone receives the power of deciding a dispute, this character also assumes the power of the whole subject by being benevolent or draconian, allowing the party to be discharged, redeemed, or penalized. If that

power is transferred to a running code or parties escaping the state structure, the power to mitigate the harshness of contractual agreements will be carried to the new structure.

Paul Schiff Berman's analysis resounds as a compelling narrative to traverse this terrain[813]. His insight into the relationship between varying legal systems and the emergence of a pluralistic global order acts as a compass guiding the available possibilities to enter an unknown stage of uncontrolled liberalism. If there is one thing gathered across contractual theories, defenses, and exceptions, it is that the legal landscape is far from homogenous in Berman's "hybrid legal space" multiple norms jostle for dominance. He lays bare the ramifications of such a system on the state's authority.

The realization that these exceptions could mark the dawn of a new era[814], where rights are no longer exercised before state judicial courts, as a demonstration of state power's erosion, cast a long shadow on individual deliberations. Who is still entitled to be ruled by state law and have violations reviewed by judicial authorities? If adjudication disappears, what will conform with having an exercisable right?

Perhaps the answer is not a binary choice between an *ius commune* and state dissolution. Instead, it might lie in embracing the tension, the dynamic balance, and the dialectic between the two, by blending the old with the new.

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[813] Berman, Paul Schiff. *Global legal pluralism: A jurisprudence of law beyond borders*. Cambridge University Press, 2012. p. 246

[814] Teubner, Gunther. "Global Bukowina: legal pluralism in the world-society." *Global law without a State*. Dartsmouth, 1996, pp. 3-28.