RIGHTS VS. REMEDIES: TOWARDS A GLOBAL MODEL

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ABSTRACT

The distinction between rights and remedies is a traditional and undebatable premise. It supports the classic account of civil law and common law as an inference from the role played by law in protecting rights and providing remedies. While civil law systems protect individual rights to the extent they are previously laid down by the legislature, common law systems authorize courts to employ their decisions to adapt the existing legal rules to the overwhelming social changes. Civil law courts are depicted as declarative and remedies as legislative response to concrete questions. Instead, common law courts are viewed as creative and remedies as judicial response.

Whether or not this account is legally picturesque as a general matter, it is ill-suited to describe the current reality of civil law and common law systems. Courts are increasingly called to reinterpret their role by overcoming the limits of the written law and giving import to constitutional values and judicial precedents. Adaptive interpretations of legal rules and deference to prior decisions are massively becoming the new guidance for resolving disputes. These changes reduce the distance between civil law and common law systems. In civil law countries, remedies gradually cease to be considered consequences of legislative choices; they become judicial responses extending their scope beyond the written law.

Changes, however, are not revolutionary. Instead, they are incremental. The scope of the law is gradually increased. New remedies defer general principles like constitutional precepts. Judicial precedents coherently govern new interpretative developments. The legal system seems to be self-regulating like never before. The doctrine of res judicata *is a crucial example of this evolution. By comparing how legal systems construed this doctrine, it emerges that the distinction between rights and remedies should be reframed as an overarching theory allowing issue preclusion in general terms.*

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TABLE OF CONTENTS

I. INTRODUCTION

> Equity jurisdiction is a branch of the law of remedies; . . . all remedies are founded upon rights, and have for their objects the enforcement and protection of rights, it is impossible to obtain an intelligent view of remedies as a whole, without first considering the rights upon which they are founded . . . . It is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords.[1]

The aim of this essay is to ask whether the traditional partition between the distinctive frame of the civil law judicial systems – the declaration of individual rights and that of the common law judicial systems – the attribution of remedies might be a methodological feature useful to understand the reason for the classical dichotomy between the object of the *res judicata* in their respective legal families.

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[1] Christopher C. Langdell, *Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 111 (1887–1888) [hereinafter *Brief Survey*].

For this purpose, the legal comparative analysis can be particularly useful. The comparative method plays a growingly crucial role,[2] precisely concerning the analysis of the common law legal tradition. "[T]he idea emerging from the research of the comparative law scholars is to overcome the contrast between the c.d. 'functionalism' (Law-as-doing) and the c.d. 'expressiveness' (Law-as-saying) that so much has had in the development of the comparative studies."[3]

The comparison of legal systems can be described as a method of understanding the specifics of each country-specific system, mostly inspired by different values, as "functional" or "policy" ones.[4]

The legal scholar (mainly in civil procedure) may have a sensitivity of his own to test the validity of that methodology – as pointed out – by sifting with the procedural principles internal to each legal system in comparison. Moreover, while this may serve to understand the evolution of the Courts' interpretation, the increasingly frequent use of the common law model as a model of comparison, also in the field of continental European civil justice, suggests further reflections.[5] Indeed, the comparative method can be useful to achieve new and better decisions in leading cases.

As noted above, this essay aims to explore a peculiar view. The purpose is to approach a classic procedural issue – as it usually seems to be the *res judicata* issue – through the lenses of the actual implications of the traditional dichotomy between rights and remedies, such as the primary account informing each attempt of comparison between civil and common law.

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[2] *See generally* THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE (Nicolò Trocker & Vincenzo Varano eds., 2005); C.H. (Remco) van Rhee & Remme Verkerk, *Civil Procedure*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 140 (Jan M. Smits ed., 2d ed. 2014); CIVIL LITIGATION IN A GLOBALISING WORLD (Xandra E. Kramer & Cornelis H. van Rhee eds., 2012); THE DYNAMISM OF CIVIL PROCEDURE - GLOBAL TRENDS AND DEVELOPMENTS (Colin B. Picker & Guy I. Seidman eds., 2016); CIVIL LITIGATION IN COMPARATIVE CONTEXT (Oscar G. Chase et al. eds., 2d ed. 2017); Joachim Zekoll, *Comparative Civil Procedure*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1306 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

[3] CATHERINE VALCKE, COMPARING LAW: COMPARATIVE LAW AS RECONSTRUCTION OF COLLECTIVE COMMITMENTS 203 (2018).

[4] *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 47 (3d ed. 1998) (suggesting "comparative researches" should be provided "with a critical evaluation"); PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 224 (3d ed. 2007) (noting the comparatist's receptiveness to evaluating "the effect of a given solution or approach to a legal problem in terms of that particular jurisdiction's cultural, economic, political and legal background").

[5] For the use of the common law model as a paradigm for the analysis of the continental European civil justice, see INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1986).

Although there is no doubt that the term *res judicata* represents a common land of comparison at the international level,[6] the starting point (that is, the methodological point) here is not the comparison in itself between the procedural models, but the purpose that is to be pursued with the comparative method and, therefore, the way in which the comparison itself should be led, with particular reference to the object of comparison.

What does it actually mean? The crucial point here is the long-standing debate between legal comparatists in order to the value of the so-called *distinctness*, *difference* or instead *connectedness*.[7] The debate particularly relates to the function of a comparative study emphasizing some distinctive features of each legal system.[8] In doing so, the elements of difference become the systematic precondition for comparing the recognized functional analogies of the institutions, which appear, indeed, to be those enclosed in the universal locution and the concept of *res judicata*.

This essay proceeds in three stages. Section I challenges the classic debate regarding the dichotomy between rights and remedies (and its limits). Moving from some new venues recently adopted in the Italian legal system, Section I offers a response to the challenges raised by inevitable disagreements over the role played by remedies in a legal system dominated by the power to claim those rights laid down by the law. Section II shows, therefore, how remedy law is going to embrace also the procedural system and procedural principles, in so dealing with a new and potentially universal space of its application. Moreover, Section II attempts to demonstrate how a procedural remedy law properly finds a fertile hummus in the cornerstone of all civil justice systems, both civil and common law ones, as it certainly can be considered the *res judicata* doctrine.

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[6] *See, e.g.*, CIVIL LITIGATION IN COMPARATIVE CONTEXT, *supra* note 2, at 563–94.

[7] *See* Pierre Legrand, *Sur L'Analyse Différentielle des Juriscultures* [*On the Differential Analysis of Legal Cultures*], 51 REVUE INTERNATIONALE DE DROIT COMPARÉ 1053 (1999); Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMPAR. L. 657 (1998); *see also* James Gordley, *Comparison, Law, and Culture: A Response to Pierre Legrand*, 65 AM. J. COMPAR. L. 133 (2017) ("A common method in comparative law is functionalism. Legal doctrines and rules are compared in terms of the functions they serve. This method is sometimes in tension with another which explains differences in law by differences in culture. That tension can be reconciled by recognizing that these methods are complementary variants of a teleological approach to law and culture, one that is concerned with the goals, purposes, and ends that the members of a society are trying to achieve. This Article responds to Pierre Legrand's claim that the functionalist method is 'positivist,' and so blinds one to differences among cultures. He, and like-minded thinkers such as Jacques Derrida, regards each society or culture as a 'singularity.' If it were utterly singular, however, it would be unintelligible. To understand the differences, as well as the similarities, one must be able to identify some features of a society and discuss them in abstraction from others. The features that chiefly define what we mean by differences in culture, and enable us to understand and appreciate them, are the purposes that the members of a society are pursuing and the ways in which they do so.") (footnotes omitted).

[8] *See* MATHIAS SIEMS, COMPARATIVE LAW 39 (2d ed. 2018).

II. RIGHTS VS. REMEDIES: AN UNRELIABLE DISTINCTION

The juxtaposition of rights and remedies is a traditional way of interpreting civil law and common law systems.[9] Like any other conceptual oversimplification, however, the distinction is frequently absolutized – particularly in the European legal scholarship – by describing the civil law systems as entirely and exclusively constructed around the legal provision of individual rights.[10] Instead, the common law systems are generally depicted as the outlet of judicial decision-making.[11]

A. The Civil Law Tradition Entrapped in the System of Rights

According to this oversimplified approach, a civil law system is usually reduced to a typology that classifies individual rights based on existing legal provisions.[12] The system of rights is a legal system in which the lawmaking bodies in their several manifestations such as the legislature, the executive branch, and the administrative agencies are empowered to take care of substantive interests of individuals.[13] "Taking care" here means various things. First, it means regulating several aspects of social life in order to allow interested subjects to legally pursue their purposes.[14] The complexity of social life, the multilayered relations among individuals, and the natural competition among opposing interests require the lawmaking bodies to provide detailed legal frameworks within which social relations can develop and produce their effects.[15]

Second, taking care of substantive interests also means entitling individuals to claim their interests by employing specific legal tools.[16] Indeed, what allows social relations to develop and produce their effects is establishing what people are entitled to do and what is forbidden to them. In

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[9] *See* Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMPAR. L. 419, 427 (1967) ("[W]hile the common law starts with a case-law basis it also includes legislative encroachments, and while the civil law starts with a legislative basis, it incorporates developments of case-law.").

[10] *See id.* at 424.

[11] *See id.* at 423.

[12] *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMPAR. L. 1, 23 (1991) ("In civil law systems, and in common law systems where there is a relevant statute, there is a tendency to say that the will of the legislature creates a legal rule which scholarship interprets and judges enforce.").

[13] *See* MARTIN VRANKEN, WESTERN LEGAL TRADITIONS: A COMPARISON OF CIVIL AND COMMON LAW 16, 21 (1st ed. 2015).

[14] *See* Catherine Valcke, *Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems*, 52 AM. J. COMPAR. L. 713, 726 (2004) ("Individuals build expectations based on legal rules which are formulated so as to account for individual expectations.").

[15] *See* Julio C. Cueto-Rua, *The Future of the Civil Law*, 37 LA. L. REV. 645, 648 (1976).

[16] *See* VRANKEN, *supra* note 13, at 21.

civil law systems, whether a behavior such as taking part into a contract or avoiding to pay a monetary obligation is permitted or not depends on the legislative choice to consecrate or not that behavior as an individual right. The legal consecration of individual rights offers two advantages: it is a way of declaring in general terms that those rights actually exist and must be respected; it is also a way of securing legal protection for them.[17] Indeed, the legal consecration of individual rights is the essential premise of their legal protection that depends in large part on providing several, alternative ways of resolving disputes.[18]

In other words, civil law lawyers cannot accept the possibility that consecrated individual rights exist without a remedial system that provides efficient outcomes. Individual expectations naturally entail responsibilities, duties, or obligations on other individuals who can breach them. For civil law lawyers, however, individual rights are worthy of judicial protection through remedies *only* where they have expressly received regard from the law.[19]

The system of rights, although multifaceted, is inherently simple. Its mode of operation is aptly described by the old Latin adage "*ubi ius, ibi remedium*."[20] Its meaning is *where there is an individual right, the law will supply a remedy*. Less concisely, it means that only a right-holder is entitled to claim for judicial relief. Even less concisely, it means that the legislature provides substantive remedies against unlawful behaviors by stating that such remedies can secure effective reliefs *only* to those individuals who claim their rights in accordance with legal provisions. Rights – or, better yet, their legal consecrations – logically and chronologically precede remedies.[21] Only those rights that the legislature has expressly provided can be protected by

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[17] *See* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 707 (2000).

[18] *See generally* Matthias Ruffert, *Rights and Remedies in European Community Law: A Comparative View*, 34 COMMON MKT. L. REV. 307 (1997) (enlightening the relationship between written legal rules and procedural remedies in civil law legal systems).

[19] *See generally* Christian Twigg-Flesner, *Remedies in European Contract Law: Themes and Controversies*, *in* LAW OF REMEDIES: A EUROPEAN PERSPECTIVE 251 (Franz Hofmann & Franziska Kurtz eds., 2019); *see also* Marcello Gaboardi, *New Ways of Protecting Collective Interests: Italian Class Litigation and Arbitration Through a Comparative Analysis*, 2020 J. DISP. RESOL. 61, 64 (2020).

[20] *See* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 78 (2001). For the interpretation of "*ubi ius, ibi remedium*" in common law countries, see Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004); Robert Allen Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L.J. 8, 22 (1970).

[21] *See generally* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed. 2007). For a discussion of the international courts' approach to remedies as vindicating the underlying rights, see Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983).

remedies.[22] Consequently, remedies cannot be imagined separately from the individual rights they are called upon to protect. In civil law tradition remedies are ways of using the legal system to make sure that someone's *legally established rights* are not taken away from them.[23]

Assuming that remedies depend on rights is a common assumption in the civil law legal scholarship. Even though this assumption is not always explicitly displayed by authors, it is implicitly employed as a principle inherent in the legal system. It represents a sort of state of mind, an intrinsic attitude to analyze legal relations through the lens of individual rights. Notwithstanding this attitude, legal scholars equally devote their attention to remedies. But remedies lend themselves to legal analysis in so far as they integrate the legal system by properly securing legal protection to individual rights.[24]

The reason for asserting that rights precede remedies in the civil law legal tradition can be explained on formal, structural grounds. Generally speaking, the civil law systems are codified.[25] Countries with civil law systems have comprehensive and continuously updated *written* legal provisions that specify all matters capable of being brought before a court.[26] Codes have distinguished civil law countries for more than two centuries; they will likely continue to distinguish those countries for centuries to come.[27] The first civil law codification was the French Civil Code established in 1804 by Napoleon I – the so-called *Code Napoléon*.[28] It gradually spread its strong influence throughout continental Europe.[29] As a modern *Corpus iuris civilis*,[30] the

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[22] *See* Ruffert, *supra* note 18, at 311.

[23] *See* Tetley, *supra* note 17, at 707.

[24] *But see* Twigg-Flesner, *supra* note 19, at 252.

[25] *See* MERRYMAN & PERDOMO, *supra* note 21, at 27.

[26] *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 456 (2000) (noting that under modern codifications "[t]he ideal was that the code could answer all legal questions and that it would not be necessary to fall back on judges' opinions, customs, or scholarly wisdom") (emphasis omitted).

[27] *See* Tetley, *supra* note 17, at 683; *see also* Louis Baudouin, *Influence of the Code Napoleon*, 33 TUL. L. REV. 21, 22 (1958).

[28] *See generally* Alain A. Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762 (1969); *see also* Baudouin, *supra* note 27, at 24.

[29] *See* Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 TUL. EUR. & CIV. L.F. 1, 12–13 (1994) ("[T]he influence of the French *Code civil*, which had achieved the bourgeois renewal and national unification sought by the French Revolution, in various countries and cultures, including a number of jurisdictions in Europe, Latin America, Asia, and Africa, standing on various levels of development and indeed ranging from primitive societies totally foreign to European standards to countries whose 'progress' had not reached much beyond an early level of capitalism.") (citing CSABA VARGA, CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON 249 (Sánder Eszenyi et al. trans., 1991)).

[30] The *Corpus iuris civilis* or, in English words, the body of civil laws was the name given to the compilation of Roman law ordered by the Byzantine emperor Justinian I in 529 CE. *See*

Napoleonic Code revealed its innovative approach to legal matters such as contracts and torts as well as its revolutionary systematic way of organizing ancient and modern legal rules.[31] In doing so, it represented a dazzling model for several European countries united by their common legal tradition deeply rooted in the Roman *ius commune* and its subsequent, centuries-old interpretations.[32]

However, the civil law legal tradition invested codes with a symbolic meaning. This legal symbolism used codes as signs to signify that civil law systems are written ones.[33] Codes became the symbol of written law more than modern Constitutions.[34] In particular, codes become the paradigm of written law by virtue of their aspiration for the completeness and accuracy of legal provisions.[35] Nevertheless, this aspiration is purely rhetoric. Like any other legislative – and even human – act, codes are doomed to be constantly updated and modified. Written legislative acts are constantly variable.

Notwithstanding these limits, systems of written law indulge this rhetorical aspiration for legal completeness as they are historically used to connect the concept of law and the idea of its imposition by a legislator.[36] Civil law systems are deeply imbued with the relationship between written law and legislative imposition.[37]

In this respect, several European words traditionally used to talk about legal issues are extremely meaningful. While several words derive from "*ius*," an old, classic Latin word, denoting at the same time the law and rights[38] (e.g., jurist, jurisprudence, *juriste*, *jurisprudence*, *Juristen*, *Jurisprudentz*, *giurista*, *giurisprudenza*), other words derive from "*directum*", a medieval Latin word, designating specifically the law as a number of legal provisions.[39] The word "*directum*" is the semantic basis of the French word "*droit*," the Italian word

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generally PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (1999); *see also* Dainow, *supra* note 9, at 420.

31 *See* Levasseur, *supra* note 28, at 765.

32 *See* Tetley, *supra* note 17, at 683.

33 *See* Ferdinand Fairfax Stone, *Primer on Codification*, 29 TUL. L. REV. 303, 310 (1955) ("[T]he method of codification . . . still appears to be the most useful tool for the doing of the task of stating the law clearly and concisely that man may know the rules and principles that are to govern his actions.").

34 *See* Legrand, *supra* note 29, at 4 ("[F]or a civil law jurisdiction, a civil code is itself a charter, a constitution (of private law).").

35 *See* MERRYMAN & PERDOMO, *supra* note 21, at 33.

36 *See* Legrand, *supra* note 29, at 7–8 (describing the codification of civil law as "the unique formulation of a sovereign proceeding from a will imposing itself hierarchically to all other law-producing agents").

37 *See* Tetley, *supra* note 17, at 725; Zeigler, *supra* note 20, at 71; Gewirtz, *supra* note 21, at 588.

38 *See* STEIN, *supra* note 30, at 13.

39 *Id.* at 24.

"*diritto*," and the German word "*Recht*."[40] Although the word "*directum*" is also closely related to the English word "right," its diffusion was particularly widespread in continental Europe.[41] This word was useful for its descriptive capacities. Indeed, it substantivized the Latin verb "*dirigere*" that means simultaneously heading towards a destination, placing along a line, and addressing somebody.[42] All these meanings have directly or indirectly to do with the concept of law and its operational mechanism. The law indicates the direction to a peaceful social life. Its indications are the legal rules. The law is what orders individuals to do or not something. In doing so, the law puts in order the social life.

The nature of law is inherently prescriptive. The law exists because a lawmaking body prescribes it by addressing legal rules to its legitimate subjects. Thus, the prescriptive nature of law requires clear and well-established legal rules. Accuracy and coherence in the law permit individuals to spontaneously adapt their behaviors to legal rules. Written legislative acts traditionally lend themselves to accuracy and coherence. The written text naturally requires precision and uniformity and assures certainty and stability.[43] When the written text has a legal content, its precision and uniformity protect the expectations of individuals who have acted in reliance on the written legal rules.[44]

Therefore, the precision and uniformity of written texts naturally lead to considering written legislative acts as appropriate ways of establishing claim rights. When the written law consecrates a claim right, it introduces into the law certainty and stability for the right-holder is undoubtedly entitled to exercise the powers embodied in the consecrated right.[45] For instance, the written law can define property right as a set of powers the right-holder is empowered to exercise. The owner is then asked to acknowledge her powers and their limits in accordance with written legal rules. The landowner realizes, for example, she is entitled to signal the borders of her land when she is expected to not trespass on the neighbors' land. Moreover, the written consecration of a claim right also allows other stakeholders to acknowledge

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[40] *Id.* at 81.

[41] *Id.* at 24.

[42] *Id.*

[43] *See* Baudouin, *supra* note 27, at 24; Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 497–98 (1994).

[44] *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 262 (1974) ("A perfectly detailed and comprehensive set of rules brings society nearer to its desired allocation of resources by discouraging socially undesirable activities and encouraging socially desirable ones."); *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976); Andrew Morrison Stumpff, *The Law Is a Fractal: The Attempt to Anticipate Everything*, 44 LOY. U. CHI. L.J. 649, 666 (2013).

[45] *See* Dainow, *supra* note 9, at 424.

their duties towards the right-holder.[46] They realize, for example, their duty to avoid any illegal or inadequate interference with the landowner and her property.

In the civil law systems, the written consecration of a claim right is traditionally named as the "positivization" of such a right.[47] The word "positivization," whose meaning and form are substantially unknown in the English language,[48] derives from the old Latin word "*positum*" and its subsequent derivation "*positivum*."[49] Generally speaking, they allude to the idea of placing and imposing something on somebody. Expressions like "*droit positif*," "*Positives Recht*," or "*diritto positivo*" historically recall the idea of legal rules that have been laid down by a legislature.[50] The positivization of individual rights is the main purpose of a written law legal system.[51]

In this theoretical context, the role played by remedies is reduced to legal reactions against unlawful behaviors. In civil law systems, individuals are breaking the law when they do not show care and respect for consecrated rights.[52] So, legal remedies can be correctly described as a means of (1) reacting against unlawful behaviors, and (2) reestablishing the order originally assured by the written legal provision in which the disregarded right is laid down.[53]

Therefore, in civil law systems, the importance of remedies is not underestimated. They are crucial in assuring the satisfaction of individual interests. Rather, remedies are simply considered as dependent on the positivization of individual rights.[54] As noted above, there is a sort of logical and chronological priority of rights over remedies. What is crucial about the

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[46] *Id.*

[47] *See* Tetley, *supra* note 17, at 683; *see also* Dainow, *supra* note 9, at 420.

[48] Even if the English language knows the expression positive law, it seems to be less widespread than the corresponding expressions in the languages of the main civil law systems.

[49] D. N. MacCormick, *Law, Morality and Positivism*, 1 LEGAL STUD. 131, 132 (1981) ("Positive law in the jargon of the jurist's trade means posited law, law established and sustained by human rulers in human communities. Positive law – *ius positivum* in Latin – thus stands distinct from natural law (*ius naturale*) understood as a body of morally binding norms independent of any human establishment.").

[50] *See* STEIN, *supra* note 30, at 81.

[51] *See generally* Philippe Nonet, *What is Positive Law*, 100 YALE L.J. 667 (1990) (analyzing the philosophical backgrounds of legal positivism); *see also* Cappelletti & Adams, *supra* note 17, at 1210.

[52] *See* Ruffert, *supra* note 18, at 311.

[53] *See* Franz Hofmann & Franziska Kurz, *Introduction to the 'Law of Remedies', in* LAW OF REMEDIES: A EUROPEAN PERSPECTIVE 1, 8 (Franz Hofmann & Franziska Kurtz eds., 2019).

[54] *See* Oscar Morineau, *Rights and Remedies*, 8 AM. J. COMPAR. L. 263, 267 (1959) ("If a right by itself, without a remedy, has no meaning, this implies necessarily that substantive rights are dependent objects of knowledge and that in order to exist they must *coexist* with their remedies."); *see also* REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY 100 (2001).

idea that rights precede remedies is that legal systems do not tolerate providing remedies such as judicial reliefs regardless of rights they are intended to protect.[55] Although it seems to be contradictory, the civil law approach to remedies is providing a means of enforcing an individual right that a legislature has previously considered as worthy of legal protection.[56] Thus, the right can be actually enforced by imposing a penalty or compensating for the harm caused by a wrongful act. In any case, the positive law directs civil law lawyers which rights deserve legal protection and which not so that only those rights that have been considered as worthy of legal protection can be *actually* protected through judicial remedies.

Conclusively, there are two kinds of legal protection in the civil law systems: first, legislative acts protect individual expectations by formally consecrating them as individual rights; second, judicial remedies empower right-holders to bring individual lawsuits against the wrongdoer.[57] The first kind of protection is merely *abstract* as it is a legal provision laid down by the positive law. Instead, the second kind of protection is *concrete* as it encompasses all the forms of judicial enforcement of a legal right resulting from a successful civil lawsuit.

B. The Civil Law Model of Remedies: Its Limits and Possibilities

Some biases are typical to this description of the civil law model. As explained above, this model is grounded in the legal consecration of rights and its logical and chronological priority over remedies.[58] If the attention devoted to individual rights emphasizes the importance of legislature, it excessively undermines the role played by courts in civil law systems. To some extent, the courts' ancillary role is consistent with the primacy of the written law laid down by the legislature or other lawmaking bodies.[59] Indeed, the civil law systems distinguish the creative role of the legislative power and the interpretative role of the courts.[60] While lawmaking bodies are authorized

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[55] *See* Morineau, *supra* note 54, at 267 ("[T]he extinguishment of the remedy produces the extinguishment of the right.").

[56] *See id.*

[57] *See* Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMPAR. L. 1, 23 (Edgar Bodenheimer trans., 1990) (noting the argument that the European legal culture depends on "the monopoly of the modern governmental legislator to create and change the law" and "the need to base decisions about social relationships and conflicts on a general rule of law, whose validity and acceptance does not depend on any extrinsic (moral, social, or political) value or purpose").

[58] *See* Morineau, *supra* note 54, at 267.

[59] *See generally* JAMES R. MAXEINER ET AL., PRACTICAL GLOBAL CIVIL PROCEDURE: UNITED STATES-GERMANY-KOREA 33, 241 (2010); JAN M. SMITS, THE MAKING OF EUROPEAN PRIVATE LAW: TOWARDS A JUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM 82 (2002).

[60] *See* Tetley, *supra* note 17, at 683; *see also* Dainow, *supra* note 9, at 420.

to provide for individual rights and define their legal regimes, courts are called upon to declare whether or not a right *laid down by the law* actually exists in a given case.[61]

The declaratory function of judgments is deemed integral to protecting the rights of individuals to have their disputes decided in accordance with the existing legal rules.[62] First, the court has to determine whether the right allegedly claimed by the plaintiff can actually be subsumed under the corresponding type of right laid down by the law.[63] Legal rights are indeed consecrated in the general and abstract words of the law. Since rights are generally depicted as types of individual claims, the courts' primary concern is to compare the alleged claim with its legal standardization to determine whether the plaintiff is *abstractly* entitled to bring a lawsuit against the wrongdoer in the given case. Second, if the plaintiff's claim is consistent with the legal provision laying down the type of right invoked by the plaintiff, the court is asked to determine whether the wrongdoer has *actually* acted in a way that is against the law and that limits the plaintiff's right.[64] The plaintiff can thus receive a remedy, such as a monetary compensation for her losses or injury, when the court has stated the plaintiff is entitled to bring her right in court. The plaintiff's entitlement to obtain a remedy depends only on the fact that she claims a right corresponding to that type laid down by the law.[65]

Courts, therefore, determine the facts and the issues involved in the case, interpret legal provisions, and enforce the legal right resulting from the successful lawsuit. In civil law systems, however, the existence of types of individual rights that have not been previously laid down by the legislature cannot be affirmed by courts in favor of one of the parties.[66] In other words,

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[61] For a comparison with common law systems, see generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992); Peter M. Shane, *Rights, Remedies, and Restraint*, 64 CHI.-KENT L. REV. 531 (1988).

[62] *See* Mauro Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 MONASH U. L. REV. 15, 26 (1981).

[63] *See id.*; *see also* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 67–68 (2001).

[64] *See* THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON LAW AND CIVIL LAW 284 (2012). Common law lawyers have traditionally and critically addressed the decision-making process in civil law countries in relation to a sort of mechanical automatization. *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 170 (1921) ("[T]he theory of the codes in Continental Europe in the last century made of the court a sort of judicial slot machine. The necessary machinery had been provided in advance by legislation or by received legal principles and one had but to put in the facts above and take out the decision below.").

[65] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 21, at 34.

[66] *See* Curran, *supra* note 63, at 81–82 ("[T]he civil-law focus on that 'higher instance' of authority, once a king who ruled by divine right, and more recently a legislature empowered by the State's most organic law, its Constitution, to pass laws, has had as a consequence . . . that

the role played by civil law courts is considered conservative instead of innovative because new legal rights must be established by legislative acts.[67] Judicial decisions can only determine whether preexistent legal rights are violated.[68] This restrictive view, however, tends to reduce legal consideration of judicial power because it describes courts as preserving the existing legal system.[69]

It is worth noting that even this view is deeply rooted in the historical origins of the civil law tradition. A merely interpretative role of the courts symbolized the European Enlightenment's reaction to the confused and uncertain legal context in the eighteenth century.[70] Before Baron de Montesquieu theorized the separation of powers doctrine[71] and its enormous impact on liberal political theories spread all around the Europe,[72] the very concept of the law underlying several European legal systems was inconsistent and changeable.[73] The law itself was a set of ancient and modern rules that were incoherent and hard to understand.[74] All public powers were indistinctly authorized to update and enhance the existing legal rules regardless of their coherence and uniformity.[75] The results were legal

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civil-law states have 'a different understanding of democracy as legitimacy of the legislature and not as legitimacy of the courts.'") (quoting Thomas Fleiner, Address at the Georgetown Law Center Comparative Constitutional Law Conference: Continental European Public Law in the Tradition of Hobbes and Napoleon (Sept. 17, 1999)).

[67] *See generally* Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241 (1985).

[68] *See id.* at 249.

[69] *See* Tetley, *supra* note 17, at 701; Cueto-Rua, *supra* note 15, at 655; *cf.* Dainow, *supra* note 9, at 425.

[70] *See generally* FRANCO VENTURI, SETTECENTO RIFORMATORE. DA MURATORI A BECCARIA [THE EIGHTEENTH CENTURY AS A REFORMER: FROM MURATORI TO BECCARIA] 645 (1969); ADRIANO CAVANNA, STORIA DEL DIRITTO MODERNO IN EUROPA: LE FONTI E IL PENSIERO GIURIDICO [HISTORY OF MODERN LAW IN EUROPE: SOURCES AND LEGAL THOUGHT] 193 (1982); JULIA RUDOLPH, COMMON LAW AND ENLIGHTENMENT IN ENGLAND, 1689–1750 (2013); *see also* Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987 (1980).

[71] *See* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., Hafner Publ'g Co. ed. 1949) (1748). For a general analysis of Montesquieu's theory of the separation of powers, see generally Sharon Krause, *The Spirit of Separate Powers in Montesquieu*, 62 REV. POL. 231 (2000).

[72] *See* James T. Brand, *Montesquieu and the Separation of Powers*, 12 OR. L. REV. 175 (1933).

[73] *See* VENTURI, *supra* note 70, at 646.

[74] *See id.*

[75] *Cf.* CESARE BECCARIA, ON CRIMES AND PUNISHMENT (1764), *reprinted in* ON CRIMES AND PUNISHMENT AND OTHER WRITINGS 3 (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press 1995) ("A few odd remnants of the laws of an ancient conquering race codified twelve hundred years ago by a prince ruling at Constantinople, and since jumbled together with the customs of the Lombards and bundled up in the rambling volumes of obscure

uncertainty and unpredictability, and social insecurity.[76] In those gloomy times, it was not altogether accidental that *philosophers* were the first to realize the urgency of political and constitutional reforms.[77] They were convinced that power should be a check to power and legal systems should be built on the separation of the executive, legislative, and judicial powers of government.[78] Montesquieu argued that while the legislative power alone is authorized to enact, amend or abrogate laws and the executive branch is empowered to establish the public security, the judiciary is only asked to resolve the disputes arising between individuals.[79]

The new doctrine departed from the ancient, undefined role played by several European courts for centuries and gave importance to the narrow application of a legal rule laid down by the legislature. Courts ceased to be considered as despotic and terrible powers amassing often legislative, executive and judicial capacities on themselves.[80] In the celebrated words of Montesquieu, courts are called to become the "mouthpieces of the law."[81] They are considered as a means of mechanically applying legal rules without interference from other public powers. As noted above, the new, limited role assigned to the judiciary was a radical, although libertarian, response to centuries of legal and judicial uncertainty.[82] Nevertheless, the myth of the mouthpiece maintained its salience even in the following centuries.[83] It was implied by the myth of a clear, plain, and comprehensive law symbolized by the Napoleonic civil code.[84] Indeed, if the meaning of each provision of the

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academic interpreters – this is what makes up the tradition of opinions that passes for law across a large portion of Europe.").

[76] *See* VENTURI, *supra* note 70, at 649.

[77] *See id.*; *see also* CAVANNA, *supra* note 70, at 237.

[78] *See* MONTESQUIEU, *supra* note 71, at 151–52 ("[C]onstant experience shows us that every man invested with power is apt to abuse it . . . . [I]t is necessary from the very nature of things that power should be a check to power.").

[79] *See id.* at 173.

[80] *See* VENTURI, *supra* note 70, at 647; *see also* Stein, *supra* note 67, at 252 ("Before codification the judges had too much discretion because of the profusion and complexity of the law.").

[81] MONTESQUIEU, *supra* note 71, at 159. For a general discussion of the role of judges as, in French words, "*bouches de la loi*," see M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 89, 102 (Liberty Fund 2d ed. 1998) (1967). *See also* Abram Chayes, *How Does the Constitution Establish Justice*, 101 HARV. L. REV. 1026, 1027 (1988) ("The judge was the mouthpiece of the law, nothing more, confined to the mechanical task of announcing consequences in particular cases.") (footnote omitted).

[82] *See* VENTURI, *supra* note 70, at 645; CAVANNA, *supra* note 70, at 193.

[83] *See* Brand, *supra* note 72, at 177.

[84] *See* Charles Summer Lobingier, *Napoleon and His Code*, 32 HARV. L. REV. 114, 128 (1918); John Henry Merryman, *The French Deviation*, 44 AM. J. COMPAR. L. 109, 118 (1996) (recognizing that several nations "imported the French codes and the set of propositions about the legal process, including the separation of powers, that was part of the French post-Revolutionary legal package").

law is clearly knowable, the role that courts come to play is apparently limited to determine whether the material facts alleged by the petitioner may fit into the legal paradigm. The result would be a judiciary that performs efficiently its job of securing certainty and uniformity in the law.[85]

The mouthpiece doctrine emphasized the declarative function of the courts.[86] Generally speaking, being a mouthpiece implies expressing the view of others without adopting, either overtly or implicitly, a specific vision of the reported view.[87] This image, however, does not fit the well-known reality that judicial interpretations inevitably seek to affect the law and develop its meaning. Courts are naturally asked to set forth an interpretation of the legal rules laid down by the legislature. Interpretative issues arise ever since legal rules exist. The legal language, although clear and reasonably comprehensive, is often uncertain. This requires judges who are deciding cases to make interpretative choices. Legal interpretation in turn requires judges to exercise their discretion even if they devote themselves to following legal texts.[88] Legal texts are often debated as they do not resolve every legal question.[89] Legal gaps sometimes stem from a serious fault of existing legal rules because of their meaninglessness or inconsistency with other rules;[90] at other times, they claim to be advancing general clauses such as unfairness or good faith which are defined broadly to encompass varying situations to be specified case to case.[91]

These dynamics suggest that the primary task of a civil law court is to implement a sound interpretation of the law. But they also suggest that the mouthpiece doctrine, taken literally, is chimerical because it reduces the law

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[85] *See generally* Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 CATHOLIC U. L. REV. 1 (1985).

[86] *See* Chayes, *supra* note 81, at 1027.

[87] *See id.*

[88] *See generally* Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

[89] *See* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 115–16 (2021) ("The text might be vague or ambiguous, or a previously clear text might have become vague in the face of some unexpected application . . . and then, but only then, construction becomes necessary. But under a different view . . . even the clearest text as interpreted is still only the first step in the process of application (construction), and even the linguistically clear application of a linguistically clear text remains subject to being set aside if that application would result in an unusually bad outcome.") (footnotes omitted).

[90] *See id.*; *see also* Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1105–14 (2012).

[91] *See* Chris Willett, *General Clauses and the Competing Ethics of European Consumer Law in the UK*, 71 CAMBRIDGE L.J. 412, 412 (2012) ("[T]he criteria to be applied are very open textured . . . making it difficult to decide how they should be interpreted."); *see also* John Dawson, *The General Clauses, Viewed from a Distance*, 29 RABELS ZEITSCHRIFT 441 (1987), *reprinted in* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 251 (2d ed. 1994).

to nothing more than what legal texts say it is.[92] On the contrary, determining the meaning of the law is a question entirely within the discretion of the court. It requires both textual and social interpretation for it depends in part on the legal analysis and in part on the awareness of present-day problems. The "struggle for the living law"[93] that Louis D. Brandeis began to fight in 1916[94] to supply courts "with the necessary knowledge of economic and social science"[95] has not been fully won even today. But it was premised on the assumption that judicial decisions are the product of reasoned deliberation and discretion.[96] That assumption appears undoubtedly sound even today as it denotes the distinctive role of courts.

C. The Doctrine of Constitutionally-Oriented Interpretation of Statutory Law

Notwithstanding the shadow of the mouthpiece doctrine, the civil law courts gradually carved out more and more room for legal interpretation. Social changes are faster than the legislature's ability to adapt to the various situations that people confront. Courts are often called upon to consider questions never regulated by the legislature or respond to the challenges raised by textual ambiguity and interpretative vacillation. It is ultimately evident that legislative acts cannot clearly resolve every dispute. As a result, judicial interpretation increasingly becomes creative rather than purely explanatory. It is easy to see why courts faced with unregulated cases are called to provide new legal guidance for the future. Courts cannot avoid deciding cases brought before them even when the existing body of written law does not provide a remedy to be applied.

An innovative decision treats the written law as a mere starting point in determining the set of considerations that support the ruling of the court. In cases involving unprecedented legal issues, the rationale for resolving disputes draws primarily on constitutional principles.[97] Relevant questions include whether the civil law courts should defer to constitutional principles and how they should employ them in reference to those cases that are to be

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92 *See* Stein, *supra* note 67, at 253 ("Just as the judge had relied on the jurists to guide him when there was too much law, so now he turned to the jurists when there was too little; and the jurists looked back to the traditional learning to provide the missing detail.").

93 Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 467 (1916).

94 *See id.* ("[N]o law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises, and to which it is to be applied.").

95 *Id.* at 470.

96 *See id.*

97 *See* Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 749 (1995) ("[T]he institution of constitutional rights will survive as an invaluable one, especially to the extent that such rights can safeguard interests that are at excessive risk in ordinary politics.").

decided.[98] The answer to those questions depends on the theory of legal sources developed in the civil law countries. In European parliamentary democracies, modern courts, even Supreme ones, exercise judicial power within the legal system the Constitution created.[99] In the civil law tradition, the legislative supremacy is expressly dictated by the Constitution itself which establishes the primacy of the written law laid down by the legislature in the legal system.[100]

The constitutional nature of the civil law systems dictates legal sources to be rigidly and hierarchically regulated. In particular, statutory law cannot contradict constitutional precepts.[101] Constitutional courts are traditionally empowered to invalidate statutes inconsistent with the Constitution and other constitutional laws.[102] But the supremacy of the Constitution operates not only as a mechanism for determining whether or not statutes are legitimate but also as a legal framework promoting and guiding adaptive interpretations of the law.[103]

In the civil law countries, the Constitution expressly subordinates the individual judge's interpretative discretion to the *law*.[104] In the European constitutional context, the law is usually intended as statutory law.[105] Although the European legislative language generally employs varying syntagms such as "*loi ordinaire*," "*Formelles Gesetz*," and "*legge ordinaria*," the idea of a statutory law created by the legislature as a result of an ordinary

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98 *See* Cappelletti, *supra* note 62, at 20; *see also* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 69 (1981).

99 *See* John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 53 (2002) ("[T]he job of the judiciary is to enforce what the legislature mandates.").

100 *See* Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MOD. L. REV. 1 (2001).

101 *See* Oskar Bülow, *Gesetz und Richteramt: Statutory Law and the Judicial Function*, 39 AM. J. LEGAL HIST. 71, 93 (James E. Herget & Ingrid Wade trans., 1995) ("[T]he judge has to stay within the legal limit drawn by the statute just as legislation is bound by the limits of the state constitution."); *see also* Thomas Fleiner, *Reflections on Continental European Public Law in the Tradition of Hobbes and Napoleon*, *in* DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 85 (Vicki C. Jackson & Mark Tushnet eds., 2002); Ferejohn, *supra* note 99, at 49. For further analysis of the Italian constitutional system in relation to the role played by the statutory law, see Alessandro Pizzorusso, *Constitutional Review and Legislation in Italy*, *in* CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 109 (Christine Landfried ed., 1988).

102 *See generally* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005). For an analysis of the role played by Constitutional Courts in Europe, see Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017 (1970).

103 *See* Cappelletti, *supra* note 102, at 1019.

104 *See, e.g.*, Art. 101(2) COSTITUZIONE [COST.] (It.), *translated and reprinted in* ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT app. I (Vittoria Barsotti et al. eds., 2016).

105 *See* Cappelletti, *supra* note 102, at 1040.

legislative process provides common ground among European legal systems.[106] Statutory law can thus be viewed as a key feature of judicial decision-making because courts are empowered to decide disputes by applying those statutes that are deemed relevant to the case. Sometimes, however, disputes can involve new legal issues such as same-sex marriage or self-driving car liability that have not been regulated by statutes. In these cases, the civil law courts have a central role to play in developing new legal principles. Since these new rules cannot be derived from the existing statutory law, they emerge from the courts' development and application of constitutional principles.[107]

The Constitution, according to civil law systems, rests upon general concepts and precepts to be implemented by statutory acts.[108] Statutory law is indeed specific and narrow in scope.[109] Generally speaking, it imposes on citizens a set of rules specifying their rights and duties in a given situation.[110] Constitutional law instead yields a very different set of rules often framed in

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[106] *See* LUNDMARK, *supra* note 64, at 290; SMITS, *supra* note 59, at 80.

[107] *See* Limbach, *supra* note 100, at 9; *see also* Ferejohn, *supra* note 99, at 53 (describing the European democratic model as a system "in which the people and their representatives became the sole source of governmental authority, which we may call the model of parliamentary sovereignty – one in which the parliament is superior both to the judiciary and to the executive").

[108] *See generally* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 501 (2013); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 413–14 (1996). The Constitution is a relatively short document in which some fundamental concepts like the freedom of speech or due process of law are formulated at high levels of generality. Several constitutional provisions establish a set of individual liberties and duties while others describe the constitutional framework for government. In particular, the Constitution tends to define the relations between legislative and executive actors, the ordinary legislative process, and the independency and impartiality of the judiciary. But the constitutional commands that create interpretative work for civil law courts in resolving concrete disputes are only those involving individual rights and duties. The reason is simply that they reveal themselves as particularly suitable for judicial application for those constitutional provisions directly affect the ways in which citizens are entitled to arrange their lives.

[109] *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 881 (1930) ("A determinate that is sought to be brought within a statute is almost always capable of being included if the statutory determinable is made as inclusive as the limits indicated by the words will allow.").

[110] For further analysis, *see* Henry T. Terry, *Correspondence of Duties and Rights*, 25 YALE L.J. 171, 188 (1916) ("When there is a generalized duty to use care for a certain end, and also a specialized duty by statute to take certain specified precautions to that end, the specialized duty may not be owed to all persons to whom the generalized duty is owed."); Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 502 (1924) ("If there are several societal organizations of men, acting at times together and at times in competition, each with its own commands and sanctions, each with its own enforcing agents and procedure, then each will be creating a set of rights and duties within its own chosen field."); Joseph W. Bingham, *Nature of Legal Rights and Duties*, 12 MICH. L. REV. 1, 18 (1913) ("[A] legal right is a legal duty seen from the handle end and that a legal duty is a legal right seen from the club end.").

fairly general terms. Therefore, statutory law is appropriate to integrate constitutional principles into a workable and detailed regulation. Nevertheless, there are situations in which various courts disagree about what a particular statutory provision actually means; in other situations, courts are even asked to resolve questions that are not expressly regulated by the statutory law. The point, thus, is to determine a rational and effective driver of judicial decisions.

As noted above, the civil law courts tend to apply constitutional principles autonomously to create new legal rules designed to answer controversial or innovative questions that are posed to them. In particular, there are hints in the Italian Supreme Court's case law of this kind of approach. A salient example is the so-called "constitutionally-oriented interpretation" of the existing statutory law.[111] This legal doctrine allows courts to interpret existing statutes in accordance with constitutional principles when the meaning of statutory provisions is uncertain and debated.[112] The description of the mechanism for controlling whether the statutory law is compatible with the Italian constitutional law is crucial to understanding how the legislative uncertainty can be worked out through the judicial decision-making.

According to the Italian legal system, the constitutional legitimacy of a given legislative act depends on its compatibility with constitutional principles as determined by the Italian Constitutional Court ("Constitutional Court").[113] The Constitutional Court is one of the two Italian Supreme Courts along with the Italian Court of Cassation ("Court of Cassation").[114] Its competence is limited to controlling the constitutional legitimacy of laws.[115] Although constitutional issues arise when inferior courts invoke its application as a primary rationale for deciding the cases before them,[116] the

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[111] *See* Corte cost., 27 luglio 1989, n. 456, Foro it. 1990, I, 18 (It.) [Italian Constitutional Court, July 27, 1989]; *see also* Gustav Zagrebelsky, La Dottrina Costituzionale e il Diritto Vivente, 2 GIURISPRUDENZA COSTITUZIONALE 1148 (1986) [Constitutional Scholarship and the Living Law].

[112] *See* Corte cost., 22 febbraio 2017, n. 58, Giur. cost. 2017, II, 650 (It.) [Italian Constitutional Court, Feb. 22, 2017]; Corte cost., 14 novembre 2003, n. 198, Foro it. 2003, IX, 2240 (It.) [Italian Constitutional Court, Nov. 14, 2003]; Corte cost., 22 ottobre 1996, n. 356, Foro it. 1997, IV, 1306 (It.) [Italian Constitutional Court, Oct. 22, 1996]; *see also* Zagrebelsky, *supra* note 111, at 1148.

[113] *See* art. 134 COSTITUZIONE [COST.] (It.).

[114] *See generally* MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 42 (1965). For a comparative perspective, see also *Organization of the Courts*, *in* CIVIL LITIGATION IN COMPARATIVE CONTEXT 137 (Oscar G. Chase et al. eds., 2d ed. 2017).

[115] *See* art. 134 COSTITUZIONE [COST.] (It.).

[116] According to Italian constitutional law, inferior courts are authorized to pose a question to the Constitutional Court when the plaintiff or the respondent decides to raise an issue regarding the legitimacy of statutory law *incidentally* – that is, in ways that require the parties to seek the court's certification for bringing the question to the Constitutional Court and the

Constitutional Court is *only* called to answer the question of whether the law suspected to be unconstitutional must actually be invalidated.[117] Whether or not a statutory law is consistent with constitutional principles depends on normative arguments regardless of how the case will be decided on the merits.[118] Inferior courts are called to adapt their decisions to the outcomes of the Constitutional Court.[119] If the Court decides to invalidate in whole or in part the statutory law, it cannot be applied by inferior courts in the cases that come before them.[120] If the Court finds the statutory law as consistent with constitutional rules, it confirms its legitimacy and applicability.[121]

Challenging the law's constitutionality before the Constitutional Court, however, requires inferior courts to spend time and resources bringing the question in the Court. The doctrine of constitutionally-oriented interpretation allows inferior courts to economize on scarce resources by resolving any doubts about the law's constitutionality *on their own*.[122] The doctrine indeed offers a response to the challenges raised by textual vagueness and interpretative uncertainty without imposing a duty to bring the question in Court. This approach undoubtedly gives inferior courts a prominent role in establishing the constitutional legitimacy of statutory law. Although the Constitutional Court continues to play the role the Constitution grants it, the doctrine authorizes inferior courts to decide whether or not the interpretation of the applicable law invoked by the plaintiff can be considered as consistent with the Constitution.[123] If that interpretation is indeed recognized as unconstitutional, inferior courts are called to adapt it to constitutional principles. This way, potentially unconstitutional laws become consistent with the Constitution to the extent they are interpreted in accordance with the courts' pronouncements.

The doctrine of constitutionally-oriented interpretation does not allow inferior courts to decide whether or not a statutory law is unconstitutional.[124] The Constitutional Court remains, in the words of European legal tradition,

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court to suspend the pending proceedings in which legal provision should be applied. *See* Legge 9 febbraio 1948, n. 1 art. 1, G.U. Feb. 20, 1948, n. 43 (It.); *see also* Legge 11 marzo 1953, n. 87 art. 23, G.U. Mar. 14, 1953, n. 62 (It.).

117 *See* art. 136 COSTITUZIONE [COST.] (It.).

118 *See* L. n. 87 art. 27/1953 (It.).

119 *See generally* GUSTAVO ZAGREBELSKY & VALERIA MARCENÒ, GIUSTIZIA COSTITUZIONALE 180–81 (2007) [CONSTITUTIONAL JUSTICE].

120 *See* art. 136 COSTITUZIONE [COST.] (It.).

121 *See* ZAGREBELSKY & MARCENÒ, *supra* note 119, at 180.

122 *See* Corte cost., 27 luglio 1989, n. 456, Foro it. 1990, I, 18 (It.).

123 *See id.*; *see also* Leopoldo Elia, *Sentenze Interpretative di Norme Costituzionali e Vincolo dei Giudici*, 2 GIURISPRUDENZA COSTITUZIONALE 1720 (1966) [*Decisions That Interpret the Constitutional Rules and the Restraints of the Judges*].

124 *See* Corte cost., 27 luglio 1989, n. 456, Foro it. 1990, I, 18 (It.).

the unique "judge of the laws" within the Italian judicial system.[125] There are no other judicial bodies empowered to invalidate statutory law because of its inconsistency with the Constitution.[126] Nevertheless, the task assigned to inferior courts is important because it significantly affects the manner in which remedies are actually framed by the Italian legal system. Inherent in the civil law lawyers' description of remedies as a means of protecting consecrated rights[127] is the idea that judges perform only a declaratory function. Judicial declaration requires, as noted above, the preliminary determination of whether the right claimed by the plaintiff can be subsumed under one of the types laid down by the law.[128] This description provides little room for judicial discretion and its adaptability to the intricacies of economic and social life. For this reason, it must be viewed as erroneous or, at least, poorly reasoned in light of the constitutionally-oriented interpretation of law.

Courts, according to the doctrine of constitutionally-oriented interpretation, can expand the set of rights laid down by the law and increase the legal protection of individual expectations.[129] By deciding whether or not a given interpretation of the applicable law is consistent with the Constitution, courts are often entitled to determine whether or not the individual interest of the plaintiff warrants judicial protection.

A remarkable application of the doctrine of constitutionally-oriented interpretation emerged, for example, from the judicial decisions providing the recovery of non-pecuniary damages in cases of medical liability. For decades, the Italian Civil Code ("Civil Code")[130] permitted the payment of monetary compensation for non-pecuniary damages only when it was established by the statutory law.[131] The Italian Criminal Code ("Criminal Code")[132] limited the recovery of non-pecuniary damages to those cases in which they derived from

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125 According to the Italian Constitutional Court's case law, the doctrine does not offend the role of the Constitutional Court in guiding decision-making when the applicable law is ambiguous or opaque with respect to its consistency with the Constitution. *See* L. n. 1 art. 1/1948 (It.); *see also* L. n. 87 art. 23/1953 (It.).

126 *See generally* art. 134 COSTITUZIONE [COST.] (It.).

127 *See supra* Section II.A.

128 *See generally* CAPPELLETTI & PERILLO, *supra* note 114, at 243–44 (noting that the judge has "the task of drawing up the balance of the judgment, including an opinion . . . stating the factual and legal bases of the decision").

129 *See* Corte cost., 22 febbraio 2017, n. 58, Giur. cost. 2017, II, 650, 651 (It.) [Italian Constitutional Court, Feb. 22, 2017]; Corte cost., 14 novembre 2003, n. 198, Foro it. 2003, IX, 2240, 2241 (It.) [Italian Constitutional Court, Nov. 14, 2003]; Corte cost., 22 ottobre 1996, n. 356, Foro it. 1997, IV, 1306, 1307 (It.) [Italian Constitutional Court, Oct. 22, 1996].

130 Codice civile, 16 marzo 1942, n. 262, G.U. Apr. 4, 1942, n. 79 (It.) [Italian Civil Code of 1942, Publ'n L. No. 262].

131 *See* art. 2059 c.c.

132 *See* Codice penale, 19 ottobre 1930, n. 1398, G.U. Oct. 26, 1930, n. 251 (It.) [Italian Criminal Code of 1930, Publ'n L. No. 1398].

crimes committed in Italy.[133] There were instead no legal provisions allowing victims of a wrongful act other than a crime to bring a lawsuit for non-pecuniary damages against the wrongdoer.[134]

In 2003, however, the Italian Court of Cassation ("Court of Cassation")[135] admitted the recovery of non-pecuniary damages even in cases of medical liability on the premise that the Constitution requires legal protection for individual and social health.[136] When the Court of Cassation was asked to decide a case of biological damages, it did not consider the Civil Code and the Criminal Code as insurmountable obstacles to compensate for non-pecuniary damages.[137] In other words, the Court asked whether the fact that the Civil Code limited the recovery of non-pecuniary damages to the situations laid down by the Criminal Code was consistent with the constitutional principles. The Court answered in the negative.[138] It found that the constitutional protection of individual health required an overarching strategy for recovering both pecuniary and non-pecuniary damages posed by medical liability.[139]

The Court recognized that the Constitution ensures protection against all health risks faced by individuals.[140] The Justices described the protection of individual health as carrying fundamental importance to the rule of law.[141] Health, as the argument goes, promotes individual values such as liberty and human dignity.[142] As a result, the Court reinterpreted both the Civil Code and the Criminal Code according to constitutional principles. It then recognized that the recovery of non-pecuniary damages was consistent with the Constitution in cases involving the violation of individual health regardless of whether such a violation derived from a crime.[143]

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133 *See* art. 2059 c.c.; art. 185 c.p.

134 *See* Corte cost., 14 luglio 1986, n. 184, Foro it. 1986, V, 2056 (It.) [Italian Constitutional Court, July 14, 1986].

135 According to Italian law, the Court of Cassation is the court of last instance against whose decisions there is no judicial remedy under national law. The Court of Cassation is a court on the merits even if parties are entitled to appeal a decision to the Court of Cassation exclusively as a matter of right. *See* art. 111(7) COSTITUZIONE [COST.] (It.).; *see generally* PIERO CALAMANDREI, LA CASSAZIONE CIVILE (1920) [THE CIVIL CASSATION].

136 *See* Cass., 31 maggio 2003, n. 8827, Foro it. 2003, I, 2272 (It.) [Italian Court of Cassation, May 31, 2003]; *see also* art. 32(1) COSTITUZIONE [COST.] (It.).

137 *See* Cass., 31 maggio 2003, n. 8827, Foro it. 2003, I, 2272 (It.) [Italian Court of Cassation, May 31, 2003].

138 *See id.*

139 *See id.*

140 *See id.*

141 *See id.*; *see also* Cass., 31 maggio 2003, n. 8828, Foro it. 2003, I, 2272 (It.) [Italian Court of Cassation, May 31, 2003].

142 *See* Cass., 31 maggio 2003, n. 8827, Foro it. 2003, I, 2272, 2274 (It.) [Italian Court of Cassation, May 31, 2003].

143 *See id.*

The Court's interpretation extended the scope of compensatory damages beyond the limits of statutory law. The rationale was not to overcome the Civil Code's text or the Criminal Code's one. It was to adapt the statutory law to the constitutional principles, which draw on fundamental social values, without betraying its legal text. The Court articulated new appropriate rules to govern cases of medical liability in accordance with the Constitution.[144] In so doing, the Court not only extended the scope of statutory law but also reframed the role that remedies are called to play in civil law systems.

The doctrine of constitutionally-oriented interpretation promotes the protection of individual expectations beyond the types of rights laid down by the statutory law.[145] The case of medical liability was salient. While the Civil and Criminal Codes' specific textual commands, taken literally, allowed the recovery of pecuniary damages in cases of medical liability, the interpretative adaptation of those commands to the Constitution permitted the additional recovery of non-pecuniary damages.[146] Judicial adaptation, thus, increased the chances that statutory law warranted the overall protection of individual health that is dictated by the Constitution.[147] Understood in this way, the role played by civil law courts is no longer a matter of protecting the rights laid down by statutory law. Remedies are no longer the logical and chronological consequences of judicial declaration of rights. Remedies cease to be the legislative response to the challenges raised by the society in a given time and become the appropriate judicial reaction to overwhelming social changes.

D. The Unpersuasive Story of Civil Law Precedent as Merely Persuasive

Another example of the workability of remedies within civil law systems is the doctrine of persuasive precedents. Legislative acts sometimes provide

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[144] *See id.*; *see also* Cass., 11 novembre 2008, n. 26972, Giust. civ. 2009, IV–V, 913 (It.) [Italian Court of Cassation, Nov. 11, 2008].

[145] *See generally* Claudio Scognamiglio, *Il Sistema del Danno Non Patrimoniale Dopo le Decisioni Delle Sezioni Unite*, 74 RESPONSABILITÀ CIVILE E PREVIDENZA 261 (2009) [*The System of Non-Pecuniary Damage After the Decisions of the Court of Cassation*]; Piergiuseppe Monateri, *Il Pregiudizio Esistenziale come Voce del Danno Non Patrimoniale*, 74 RESPONSABILITÀ CIVILE E PREVIDENZA 56 (2009) [*Existential Prejudice as a Voice of Non-Pecuniary Damage*].

[146] *See* Cass., 11 novembre 2008, n. 26972, Giust. civ. 2009, IV–V, 913, 914 (It.) [Italian Court of Cassation, Nov. 11, 2008].

[147] The Court of Cassation widely employed the constitutionally-oriented interpretation of statutory law. It allowed the Court to increase the protection of others fundamental constitutional values such as the right to family self-definition or the rights to personal reputation, name, and confidentiality. *See generally* Adele Anzon, *Il Giudice A Quo e la Corte Costituzionale tra Dottrina del L'Interpretazione Conforme a Costituzione e Dottrina del Diritto Vivente*, 2 GIURISPRUDENZA COSTITUZIONALE 1082, 1090 (1998) [*The A Quo Judge and the Constitutional Court Between the Doctrine of Constitutional Interpretation and the Doctrine of Living Law*].

uncertain answers to the questions raised by social change. Legal texts can be ambiguous and suggest unclear solutions to concrete disputes. Courts are asked to fill legal gaps providing palatable solutions. However, legal uncertainty often leads courts to divergent views about the law. Interpretative debates, thus, create even more legal uncertainty and unpredictability.

Judicial precedents play a crucial role in overcoming both legislative and interpretative uncertainty. But each legal system makes plain its vision of the judiciary according to its constitutional framework. Civil law lawyers tend to describe the role played by courts as merely implementing the written law while common law lawyers traditionally accept the judiciary as a public actor who can reverse interpretive courses and announce new rules.[148] If civil law courts are characterized by a high deference to the written law, it depends rigorously on the primacy of legislative acts in the constitutional framework.[149] On the contrary, common law courts traditionally operate within a more expansive conception of the law in which judicial decisions play a crucial role.[150] The judiciary's distinctiveness in both legal systems derives from its relationship with enacted legislation.[151] Common law systems reflect the intuition that the case law and legislative acts are home to competing solutions while civil law systems constrain judges by subordinating their personal theories to legislative texts.[152]

Civil law lawyers often emphasize differences among legal systems.[153] As a result, they tend to embrace a weak vision of *stare decisis* principle.[154] Since the case law cannot be considered as a source of law in civil law systems, precedents are depicted as merely persuasive. The practice of deferring to precedent would be characterized by a certain degree of flexibility. Both inferior and subsequent courts could adopt divergent views

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[148] *See* PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 69 (1999) (describing the role played by courts in common law countries as awaiting "the interpretative occasion"); *see also* JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 334–35 (2006); David Nelken, *Beyond Compare? Criticizing "The American Way of Law*," 28 LAW & SOC. INQUIRY 799, 827 (2003) ("The courts in the United States are (relatively speaking) very open to substantive economic, social, and political science arguments. In continental Europe, on the other hand, legal education, training, and practice gives them far less weight: legal discourse is more in control.").

[149] *See* Dainow, *supra* note 9, at 425; Tetley, *supra* note 17, at 702; Mauro Cappelletti & John Clarke Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1215 (1966).

[150] *See* BELL, *supra* note 148, at 335; Nelken, *supra* note 148, at 827.

[151] *See* SHAPIRO, *supra* note 98, at 69; *see also* BELL, *supra* note 148, at 336.

[152] *See* Dainow, *supra* note 9, at 421; Tetley, *supra* note 17, at 701; *see also* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 988 (1995).

[153] *See generally* SIEMS, *supra* note 8, at 53–54.

[154] *See* JOHN HENRY MERRYMAN & ROGELIO PIREZ-PERDOMO, THE CIVIL LAW TRADITION 34 (3d ed. 2007); *see also* LUNDMARK, *supra* note 64, at 80.

regarding previously decided issues.[155] The persuasive nature of precedents, however, is an oversimplification. In civil law systems, the role played by courts in promoting legal certainty and uniformity is increasingly significant.

Although judicial decisions do not exert constraining force that exceeds its persuasiveness, legislative enactments often expressly authorize the Supreme Court's task of warranting interpretative uniformity and application consistency.[156] According to Italian law, the task of fashioning and preserving the system of precedents is assigned to the Court of Cassation.[157]

The Court of Cassation is the court of last instance in by far the majority of cases.[158] Unlike the Constitutional Court, it is not called to determine whether or not legislative acts are consistent with the Constitution.[159] Rather, it is asked to adjudicate concrete disputes through the application of statutory law.[160] It is true that the doctrine of constitutionally-oriented interpretation discussed above allows the Court of Cassation to promote new statutory interpretations based on constitutional principles.[161] Even so, the Court continues to perform its job by applying statutory law to concrete cases.[162] Professor Michele Taruffo, however, characterized the Court of Cassation as the ambiguous vertex – or, in Italian, "*il vertice ambiguo*" – of the judiciary.[163] The Court's ambiguity depends on the fact that its task is twofold. According to the Italian Code of Civil Procedure ("Code of Civil Procedure"),[164] the Court is empowered to adjudicate disputes as a court of last instance.[165] According to the Italian Law on Judiciary Organization, the Court is also

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155 *See* Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1, 13 (2011) ("The role of stare decisis in the common law system is seen as central to the judge's more creative role."); *see also* Kevin J. Mitchell, *Neither Purse nor Sword: Lessons Europe Can Learn from American Courts' Struggle for Democratic Legitimacy*, 38 CASE W. RES. J. INT'L L. 653, 659 (2007).

156 For a discussion of those challenges, see *infra* Section II.D.

157 *See* R.D. 30 gennaio 1941, n. 12 art. 65(1), G.U. Feb. 4, 1941, n. 28 (It.) (concerning the regulation of the judiciary organization).

158 *See generally* Cappelletti, *supra* note 102, at 1047; John Henry Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665, 669 (1967).

159 *See generally* CALAMANDREI, *supra* note 135, at 110–20.

160 *See id.*; *see also* Cappelletti, *supra* note 102, at 1048; Merryman & Vigoriti, *supra* note 158, at 670.

161 *See supra* Section II.C.

162 *See* CALAMANDREI, *supra* note 135, at 120. It is worth noting that Professor Calamandrei distinguished between the function of the Court in deciding cases (*ius litigatoris*) and the function of the Court in warranting the consistency of the statutory law in the course of time (*ius constitutionis*). For further analysis, see *infra* Section II.D.

163 *See* MICHELE TARUFFO, IL VERTICE AMBIGUO (1991) [The Ambiguous Vertex].

164 *See* Codice di procedura civile, 28 ottobre, 1940, n. 1443, G.U. Oct. 28, 1940, n. 253 (It.) [Italian Code of Civil Procedure of 1940, Publ'n L. No. 1443]; *see also* art. 111(7) COSTITUZIONE [COST.] (It.).

165 *See* art. 360 c.p.c.

asked to protect uniformity and consistency in the law against the risks of interpretative diversity.[166] The civil law tradition has called this latter task as *nomophilachia*, an old Latin word denoting an interpretative process marked by attention to legal rules and their consistency.[167] This process is premised on the assumption that textual uncertainties and interpretative debates must be resolved by a *unique* judicial authority. Its uniqueness indeed warrants legal certainty, predictability, and consistency.

It is worth noting that Justices are entitled to exercise their interpretative power when concrete disputes come before the Court.[168] When Justices decide cases in accordance with governing law, they also give a response to the challenges raised by interpretative disagreements.[169] In other words, the Court's decisions operate not only as adjudications but also as *precedents*. If adjudications satisfy the litigants' expectations, precedents enjoy widespread public interest because they lead stakeholders to modify their behaviors to accommodate the new interpretation of existing law.

Disagreements over legal interpretation can be horizontal or vertical.[170] For purposes of what follows, the concept of horizontal disagreements refers to divergences between the Court Justices of past and present.[171] Instead, disagreements can be called vertical when inferior courts come to disagree with the Court of Cassation.[172]

Changes in judicial personnel produce *horizontal* changes in the Court's backgrounds and ideologies.[173] The Justices' departures and arrivals can thus affect the Court's interpretative consistency. For this reason, the Court is entitled to resolve the interpretative disputes it generated. When two distinct lines of precedent come into conflict, the Court can discard one of them or articulate a new interpretation.[174] These efforts reduce the risks of judicial

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166 *See* R.D. n. 12 art. 65(1)/1941 (It.).

167 *See* CALAMANDREI, *supra* note 135, at 123.

168 *See id.*; *see also* art. 111(7) COSTITUZIONE [COST.] (It.); art. 360 c.p.c.

169 *See* CALAMANDREI, *supra* note 135, at 130; Cappelletti, *supra* note 102, at 1049; Merryman & Vigoriti, *supra* note 158, at 670.

170 *See generally* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013); Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789 (2018).

171 *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); *see also* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1850 (2013).

172 *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 188 (2006); *see also* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1469 (2013).

173 *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 11 (2008); Caminker, *supra* note 171, at 853.

174 *See* R.D. n. 12 art. 65(1)/1941 (It.); *see also* CALAMANDREI, *supra* note 135, at 130; Cappelletti, *supra* note 102, at 1049; Merryman & Vigoriti, *supra* note 158, at 670.

errors in the future and enhance the uniformity of the legal system.[175] According to Italian law, the interpretative dissonance can be overcome through a special mechanism. The Chief Justice of the Court can refer the power to decide the case involving the issue debated by prior decisions to a special joint session of the Court.[176] While the Court is usually entitled to decide cases in ordinary sessions or, in the words of Italian law, "sezioni semplici," it is asked to decide controversial issues in a special joint session called "sezioni unite."[177] In ordinary sessions the Court is composed of five justices while in joint sessions it is composed of nine justices.[178] The larger composition is useful in helping the Court to evaluate competing precedents and reach thoughtful solutions.[179]

For this reason, Italian law treats the precedents of joint sessions as worthy of a high degree of deference. When ordinary sessions are called to resolve disputes under the rules developed by the joint session in its precedents, they cannot treat those rules as exercising a merely persuasive force.[180] According to the Code of Civil Procedure, ordinary sessions must follow the joint session precedents or give significant reasons for not doing so.[181] However, ordinary sessions are not empowered to overrule prior decisions even when there are plausible reasons to be skeptical about the soundness of the joint session precedents.[182] The Code of Civil Procedure, indeed, provides that a deviation from the settled law can be exclusively decided by the same joint session that is asked to balance competing arguments and determine whether to follow its own precedents or depart from them.[183]

The effect of precedents on lower courts reveals, instead, the ways in which the Italian legal system prevents *vertical* disagreements.[184] Generally speaking, civil law systems tend to give little weight to this type of judicial disagreement for compelling reasons. First, interpretations by inferior courts are by their nature unstable and changeable.[185] Indeed, they are subject to

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175 *See* CALAMANDREI, *supra* note 135, at 139.

176 *See* art. 374(2) c.p.c. (amended 2006).

177 *Id.*; *see also* CAPPELLETTI & PERILLO, *supra* note 114, at 271–72 ("When there is a conflict in decisions between sections, the first president of the court may entrust a case to 'united sections.'").

178 *See* R.D. n. 12 art. 67(1)/1941 (It.).

179 *See* CALAMANDREI, *supra* note 135, at 336.

180 *See* art. 374(3) c.p.c. (amended 2006).

181 *Id.*

182 *See id.*

183 *See id.*

184 *See* CALAMANDREI, *supra* note 135, at 129; *see also* Cappelletti, *supra* note 102, at 1049; Merryman & Vigoriti, *supra* note 158, at 670.

185 *See* Caminker, *supra* note 171, at 851 ("Even if courts uniformly applied federal rules, absolute predictability would still elude us. First, legal rules are unstable over time. While stare

additional considerations as the appellate process runs its course. Second, vertical disagreements do not seriously undermine the general consistency of the legal system because only the rulings of the Court of Cassation represent the final word of the judiciary on interpretative controversies.[186]

However, there is no doubt that even inferior courts engender significant reliance on precedents.[187] Stakeholders usually presume against judicial changes.[188] They need legal certainty because they act in reliance on existing legal rules.[189] When inferior courts follow the precedents of the Court, stakeholders expectations are satisfied. Instead, when a precedent is overruled by inferior courts, their expectations are inevitably dismissed. The dynamics of precedential reliance show that *stare decisis* is an underlying premise that informs *all* legal systems. It is a means of promoting universal social values such as legal certainty and predictability.[190] The point then is to determine whether and to what extent the stare *decisis* principle can be considered as flexible.

In *Citizens United v. FEC*, the United States Supreme Court established that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision."[191] What is true in common law systems seems to be equally true in civil law jurisdictions. Even if there are no legal provisions – written or not – that expressly dictate that prior decisions must be followed, legal systems are naturally based on the assumption that legal interpretations must evolve *consistently* and *reasonably*. Fidelity to

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decisis creates a strong presumption that existing legal rules will govern present behavior, courts can still abruptly change the law by overturning precedent.") (footnote omitted).

186 *See* R.D. n. 12 art. 65(1)/1941 (It.).

187 *See* Kozel, *supra* note 172, at 1460 (arguing that among the virtues of following precedent "is the protection of reliance expectations"); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 78 (1989) ("If the system does not adhere to stare decisis, no one will formulate expectations about her future legal obligations on that assumption.").

188 *See* Kozel, *supra* note 172, at 1480 ("By giving regard to citizens' attempts to comply with the legal boundaries and mandates in force at any particular time, the judiciary can help to infuse the law with 'qualit[ies] of clarity, certainty, predictability, [and] trustworthiness.'" (quoting JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 272 (2d ed. 2011)).

189 *See id.* at 1490 (emphasizing stakeholders' reliance expectations as "worthy of judicial solicitude").

190 *See* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987) (plurality opinion) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is 'a natural evolution from the very nature of our institutions.'" (quoting W.M. Lile, *Some Views on the Rule of* Stare Decisis, 4 VA. L. REV. 95, 97 (1916))).

191 Citizens United v. FEC, 558 U.S. 310, 363 (2010) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)); *see also* Hertz v. Woodman, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

precedents, therefore, is not "an inexorable command"[192] but a reasonable tendency of the legal system to ensure stability and predictability in the law. Still, in the words of the United States Supreme Court, *stare decisis* is "indispensable"[193] as a legal rule but it is also "a wise policy,"[194] meaning a matter of persuasion rather than restraint. The tendency to protect legal certainty and uniformity expresses the legal systems' desire to prevent the disruptive impact of precedential changes for the benefit of society as a whole.

The same is true of many other legal systems that are rooted in civil law tradition. It is worth noting, for example, that Italian law reduces the risk of vertical disagreements by requiring the Court of Cassation to set its agenda in accordance with its precedents.[195] In particular, when a court of appeals has decided a case consistent with the precedents of the Court, Justices cannot hear the case unless the party who appealed the decision employs arguments that persuade Justices to review the case.[196] This legal provision makes a tangible impact on inferior courts. Inferior courts are forced to follow the decisions of the Court because they reduce the risk that their decisions will be overruled by the Court in the future.[197] This sort of judicial conservatism[198] indirectly enhances *stare decisis* in a civil law system and promotes legal certainty and predictability.

It bears some resemblance to the United States Supreme Court's decision to grant or deny certiorari.[199] The similarity regards the role played by precedents in setting the Court's agenda and its power to constrain inferior courts.[200] There are also significant grounds of distinction between the Supreme Court orders and the Court of Cassation orders. The most striking difference, almost in the eye of a civil law lawyer, seems to be the one

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192 Payne v. Tennessee, 501 U.S. 808, 827 (1991).

193 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

194 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); *see also* Agostini v. Felton, 521 U.S. 203, 235 (1997) (stating that *stare decisis* "reflects a policy judgment"); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1537 (2000).

195 *See* art. 360–bis(1) c.p.c. (amended 2009).

196 *See id.*

197 *See* Caminker, *supra* note 171, at 851; Kornhauser, *supra* note 187, at 78; Kozel, *supra* note 172, at 1480. For the analysis of civil law legal systems, see MERRYMAN & PIREZ-PERDOMO, *supra* note 154, at 34.

198 *Cf.* Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008).

199 *See generally* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Michael J. Gerhardt, *Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 83 (1991) ("When considering which cases to hear, the Court has its first and most important chance to deliberate on the degree to which it intends to be constrained by a prior opinion.").

200 *See* Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 971 (2005).

concerning the criteria for granting certiorari. While Rule 10 of the Supreme Court Rules explains that "[r]eview on a writ of certiorari is . . . a matter of . . . judicial discretion,"[201] Article 360-bis of the Code of Civil Procedure dictates the Court of Cassation to deny certiorari when the lower court's judgment does not follow the Court precedents.[202] Finally, the rule applied in the common law country, in which traditionally *stare decisis* prevails, seems to be particularly flexible in considering precedents as worthy of deference.[203] Instead, the rule applied in the civil law country, in which the primacy of the written law dominates, is compulsory.[204]

There is no contradiction in these different visions of precedent. They simply show that remedies are playing a new role in civil law countries. They depend more on judicial creativity than on the formal consecration of individual rights by written law. Civil law courts continue to operate within their own legal framework, but new possibilities allow them to promote clarity and uniformity in legal texts as well as certainty and coherence in legal rules. The driving concern of civil law courts is not only with protecting individual parties in light of their settled expectations, but the point is also to ensure that the legal system continually adapts to social changes and new legal challenges.

E. The Common Law System of Remedies: Toward a Universal Model?

The new generation of civil law lawyers seems to be familiar with the use of precedents to guide courts and innovate legal systems. Remedies are no longer viewed as a logical and chronological consequences of the rights laid down by the law. Remedies are considered as a means of ensuring legal protection when the written law is silent or controversial. This approach to rights and remedies is undoubtedly a reaction to the vision of civil law systems as entrapped in the idea of rights consecrated by the law. New remedies emerge from judicial decisions rather than legislative acts. Supreme Courts, in particular, play a relevant role in crafting a new remedial law. Constitutional principles are unsurmountable limits that must be respected, but they are also guidelines for legitimate and coherent decisions.

The gradual assimilation of the new remedial rules into the existing legal framework is common in several European countries. Within the German and French legal systems, for example, constitutional rules have the same

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201 SUP. CT. R. 10.

202 *See* art. 360–bis(1) c.p.c. (amended 2009).

203 *See* Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954) ("[O]ur jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari." (quoting Address of Chief Justice Warren, ALI Annual Meeting, May 19, 1954)); *see also* PERRY, *supra* note 199, at 47.

204 For an analysis of the Italian legal system, see GIAN FRANCO RICCI, IL GIUDIZIO CIVILE DI CASSAZIONE 225 (3d ed. 2019) [THE CIVIL PROCEEDINGS OF CASSATION].

resonance that we have seen in the Italian legal system.[205] The law of remedies is gradually emancipating from the slavery of the system of rights. Remedies tend to be less tethered to statutory provisions and more receptive to judicial decisions that advance constitutional protections.[206] In other words, civil law systems are embracing something like a pragmatic view of remedies. The result is the replacement of the existing system of rights with a flexible one. Judicial pronouncements face social changes and adapt the protection of individual expectations to constitutional principles.

Ubi remedium, ibi ius should at least be the new motto of civil law lawyers. As much as they remain attached to the converse (i.e., *ubi ius, ibi remedium*), civil law lawyers are called to confront the serious question of where the remedies come from. Who really creates them? Who can therefore change them? Civil law lawyers cannot leave these questions unanswered for much longer. They should recognize that the role played by national legislatures in defining individual rights is no longer crucial. Several pragmatic considerations weigh on the Parliaments' authority to pass laws: problems of procedural workability periodically arise, senators and representatives come and go, complexities in legal text are frequent.[207] As a result, the legislative process is often delayed and disrupted.[208]

The experience of common law provides an efficient model of coexistence.[209] Common law historically relies on some scattered statutes while precedents play an enormous role in shaping both English and American law.[210] It is true that statutory law seems to play an increasingly significant role even in common law systems because of the increasing complexity of

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[205] *See generally* Jan Felix Hoffmann, *Remedies in Private Law from a German Perspective*, *in* LAW OF REMEDIES: A EUROPEAN PERSPECTIVE 45 (Franz Hofman & Franziska Kurtz eds., 2019).

[206] For an analysis of the Italian legal system, see MARINO BIN, IL PRECEDENTE GIUDIZIARIO. VALORE E INTERPRETAZIONE 55 (1995) [THE JUDICIAL PRECEDENT. VALUE AND INTERPRETATION]; Mario Rosario Morelli, *Il Diritto Vivente Nella Giurisprudenza Della Corte Costituzionale*, 2 GIUSTIZIA CIVILE 169, 170 (1995) [*The Living Law in the Constitutional Court's Precedents*].

[207] *See* Kaare Strøm, *Roles as Strategies: Toward a Logic of Legislative Behavior*, *in* PARLIAMENTARY ROLES IN MODERN LEGISLATURES 85 (Magnus Blomgren & Olivier Rozenberg eds., 2012).

[208] *See* Rudy B. Andeweg, *The Consequences of Representatives' Role Orientations: Attitudes, Behaviour, Perceptions*, *in* PARLIAMENTARY ROLES IN MODERN LEGISLATURES 66 (Magnus Blomgren & Olivier Rozenberg eds., 2012).

[209] *See* Dainow, *supra* note 9, at 423 (arguing that "two vital and essential points of reference for a comparison of the sources of positive law in the civil law and the common law are 'legislation' and 'judicial decisions'" while "[t]o reverse the phrase, in common-law thinking the distinction would be 'case law' and 'enacted law'").

[210] *See generally* LOUIS L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (1981); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (1988).

modern society,[211] but the legal system is still undoubtedly driven by precedents.[212]

Moreover, even if constitutional rules generally take no position on precedents, their role is entrusted with policy considerations.[213] The driving concern is with protecting the inherent consistency of the legal system through judicial pronouncements, in addition to existing statutory law. The protection of the legal system's unity depends on legal certainty and judicial coherence. Advancing constitutional values and precepts is the task assigned to the judiciary in order to fill gaps in the law and resolve interpretative doubts.

III. A NEW REMEDIAL POLICY ACROSS LEGAL SYSTEMS

The previous analysis has retraced in detail the long debate that has developed on the dichotomy between rights and remedy law – the investigation's subject of this essay.

First of all, in light of the aforementioned considerations, one might wonder why such a distinction has continued to develop, regardless of terminological statements. In other words, what is the point of discussing this distinction, caustically defining a "nice idea"?[214] Given a definition of "right" as the legal attribution of protection by the case, which makes it worthy to assign a position of advantage,[215] we may believe that either it is generally defensible that the remedy pre-existed with the right, either such a (chronological) dichotomy might be appreciated by the essence of the *res judicata* doctrine. In reversing the elements, *res judicata* tends to be held in the right, irrespective of whether it has been declared by the judgment, or it has been attributed by the remedy.

At the same time, this way of thinking (in terms of chronological dichotomy) does not seem satisfying, or at least not sufficient. The reason is simple – this approach is new since it tries to emphasize the essence of the dichotomy on the subject of the civil process and its categories and institutions, while it has instead received proper attention on the contract violation theory.[216] Therefore, the ideas should be clarified not so much about

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211 *See* Andeweg, *supra* note 208, at 66.

212 *See generally* GERHARDT, *supra* note 173, at 38.

213 *See* Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 324 (2009) ("The application of each [constitutional] rule has in recent years had major economic and social consequences, and has created clear 'winners' and 'losers' on issues which are in fact highly charged 'as a matter of morality or public policy.'" (quoting David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 916–17 (1996))).

214 *See* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 735–36 (1992).

215 *See* Terry, *supra* note 110, at 188; Corbin, *supra* note 110, at 502; Bingham, *supra* note 110, at 18.

216 *See* Dainow, *supra* note 9, at 427.

the traditional right versus remedy dichotomy, but about a renewed consistency, seen by both legal families (with particular reference to the Italian one).

Accordingly, it is worth explaining how the differences between the two families are, by definition, not an obstacle to building a fundamental global nucleus of the civil justice cornerstones.

The question could be whether and how the civil law system can reflect the benefits raised also by a remedial approach to protection, given the goals of the effectiveness and the efficiency of civil justice (through the lenses of the *res judicata*).[217] One possible answer is to define *remedy approach*, and especially whether there can be a space for a *new* approach of this nature within a civil law system of rights.

It is worth noting that the crucial point of remedy protection must be assessed within the preliminary framework of "[r]emedies perform two critical functions in the law: they define abstract rights and enforce otherwise intangible rights."[218] The point marks the real reason for the dichotomy, it concerns how an abstract legal position is protected and suitable to preserve to the owner the feasibility of the (own) case.[219] The point is, of course, not enforcement as such; the emphasis on the idea that rights without remedies would only be "mere ideals, promises, or pronouncements that may or may not be followed"[220] remains precisely nothing more than an icon of a pre-packaged distinction,[221] but certainly not an explanation of the same. Such a statement denotes that from a functional point of view between civil and common law there is no difference, nor frankly could there be. From this perspective, it would be misleading to insist on a contrast between the declarative protection of rights and the remedy protection based on the *reduction* of the former (from the corner of the second) as a form not even of real protection but simply of "expressions of social values."[222]

Notwithstanding the common point is precisely the decision's enforcement, the gap between the two legal systems exists in the way the request for legal protection comes to fruition. Moving from the Latin maxim *ubi remedium, ibi ius*, it is worth highlighting how the provision of protection offered by the civil law shows its effectiveness by the attribution of a subjective position (e.g., of a right) as a direct consequence of the attribution of a remedy. This *remedy* is nothing more than the judgment's statement, with the (historic) difference – if assessed in the same way as the current system of civil law – due to the *typical* origin of the English-inspired "forms of

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217 *See generally* Hoffmann, *supra* note 205, at 45.

218 Thomas, *supra* note 20, at 1638.

219 *See* Terry, *supra* note 110, at 188; Morineau, *supra* note 54, at 267.

220 Thomas, *supra* note 20, at 1639.

221 *See generally id.*

222 *See id.* at 1638.

action."[223] Therefore, a system of typical actions with-trapped to the current continental system based on the absence of action's typicality.

Nevertheless, the civil law tradition has considered remedy protection by focusing on the correlation of the conflicting terms.[224] As the system of *rights* assumes statutory law only at the head of the legislature. Hence, the attribution by the remedy of a preeminent legal position also assumes forming power at the head of the court, according to the *stare decisis* rule. Consequently, the approval of the *anti-formalism* of remedial protection to the *conceptualism* of the continental system inspired by the German Pandectists in the early 19th century,[225] considered theoretical and so ineffective and less flexible, has indeed seized a *moment* of the dichotomy of the respective systems while not adequately exhausted the primary background, stopping at the reason of the election, for one or the other.

In sum, while the realist mainstream which informed numerous studies on the dichotomy has the merit of informing a civil justice system, like the American one that was genuinely alternative to the continental one, it exasperated the *stare decisis* principle, thinking of the correlation between the origin of rights and the predictability of judicial decisions based on precedents. At the same time, it is worth remembering how, even until now, it has been difficult to give a complete systematization of a sort of *law of remedies*.[226] It is especially due to the ambiguous place where we can allocate it, such as "somewhere between substance and procedure, distinct from both but overlapping with both."[227]

A. "Procedural" Remedy Law

The purpose of this essay is, therefore, curious and grounds itself in a comparative view of the last consideration. On the one hand, it is a matter of proceeding from the peculiar aspects of the respective forms of protection, and on the other to avoid falling into the gap between substantive law and procedural law.

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[223] *See* FREDERIC W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 2 (1909) ("The forms of action we have buried, but they still rule us from their graves.").

[224] *See* Dainow, *supra* note 9, at 427.

[225] *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 495–96 (2003) (emphasizing the "Jhering's satirical critique of the German Pandectist project of locating private-law doctrine in a 'heaven of legal concepts'" (quoting Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUMB. L. REV. 809, 809 (1935))).

[226] *See generally* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161 (2008).

[227] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 1 (3d ed. 2002).

We should avoid, for a while, the traditional distinction between the *decision rules* to the *rules of conduct*, which seems to qualify as the primary element of each rights system. It reflects the fundamental consideration on which only the legislature, and not the judges, has the capacity to abstractly define the rights, and the judges are asked to apply the rule on the case. However, it is worth noting that such an active role of the judiciary to reflect the values of society at large has been proven to be true indeed for several civil law legal systems, as the best legal scholarship has recognized for ages.[228] Moreover, the lack of constitutional revisions shows the elasticity that follows the judicial interpretation of specific fact-patterns to tailor into new modern values.[229] As it might concern this essay, that elasticity – as we will see – has created a renewed concept of the *res judicata* extension, mixing the substantial ratios of the contract (in)validity with typical common law values on the economic efficiency of civil process and trial litigation. No doubt, on the contrary, that remedies find its foundation in the decision rules, but at the same time the new issue is to seek in each legal tradition one or more rapprochement points, starting from the decision rules of both legal systems, whether or not they are historically defined as *remedial*. Such a rapprochement can, finally, serve as a global approach to a procedural remedy law.

As noted above, the focus is thus on the growing contribution of jurisprudence (particularly within the Italian legal system) for the processing and sometimes also the creation of the law.[230] In other words, putting aside the different role played by the sources of law in common and civil law legal systems, the mechanism of the system processing by the jurisprudence takes place in a not-so-opposite way in the respective legal families. The profile that is of interest here is then of the recognition of the substantive arguments that may bring the judicial reasoning in the civil law countries closer to the common law ones. This is particularly true when the civil law judges employ not only the principles of proportionality, adequacy, and reasonableness in the decision-making process, but also the same procedural techniques by which the judicial reasoning shapes these principles.[231]

Why could this profile of civil law jurisprudence be called *remedial*? What can be the effects and, above all, the benefits of it, even within the basic framework of the rights system?

If the primary reasons for the antagonism between rights and remedies are those of a dichotomy between substantive law and procedural law, often

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[228] *See* LEGRAND, *supra* note 148, at 76; MAXEINER ET AL., *supra* note 59, at 241; LUNDMARK, *supra* note 64, at 284; Smits, *supra* note 59, at 82.

[229] *See supra* Section II.C.

[230] *See id.*

[231] *See* LEGRAND, *supra* note 148, at 76; MAXEINER ET AL., *supra* note 59, at 241; LUNDMARK, *supra* note 64, at 284.

ending up canceling each other and pursuing necessary accomplishment,[232] a different topicality of an even remedial profile of the civil law adjudication can likely be appropriately found in the way in which the jurisprudence *employs* the procedural system. Therefore, reasoning in terms of remedy law also means trying to provide an interpretive space at the mere procedural level, in which the judge's activism – and "a day in court" – plays an essential role.

The daunting task is to evaluate whether the civil law legal systems might perform a typical remedy law function, and in so doing whether they might achieve a better – that is, more correct and efficient – decision on the case. More precisely, a better decision means a decision which reflects, on the one hand, the rights system and its declarative nature, and on the other, several significant ways of reasoning traditionally provided by the remedy law system. The purpose here is thus twofold: first, it allows to turn the classical setting of the dichotomy between rights and remedy law as it has been consolidated within the civil law legal literature.[233] Second, it permits to approach a possible new global procedural remedy law as a model of reasoning embracing both legal traditions, in so reducing the gap between them even in this way.[234]

In essence, what might be changing is simply the way traditional rights are implemented and insured by the judgment. It is time to test this assumption on the crucial issue of *res judicata*.

B. Through the Lens of the Res Judicata *Doctrine*

First, arguing in terms of *res judicata* within civil law legal systems means to be aware of how the relevant point here is to outline the subject matter of the proceedings, because the judicial decision will be binding for the parties with respect to the subject matter of the proceedings. Then, the result is to find a more suitable context of the *res judicata* doctrine as elaborated by the remedial systems within the civil law legal scenario.

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[232] In the Italian literature, see Ugo Mattei, *Diritto e Rimedio nell'Esperienza Italiana e Statunitense: Un Primo Approccio*, 1 QUADRIMESTRE 341 (1987) [*Right and Remedy in the Italian and American Experience: A First Approach*]; Guido Smorto, *Sul Significato di "Rimedi,"* 17 EUROPA E DIRITTO PRIVATO 163 (2014) [*On the Meaning of "Remedies"*]. For the common law literature, see Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 36 (2000).

[233] *See* VRANKEN, *supra* note 13, at 21; Weiss, *supra* note 26, at 456.

[234] That is not the same as denying the differences between the two systems, which, as has been possible, still exist and stem from reasons for the evolution of law in the history of their respective systems, influenced by social and economic variables of different relevance and scope. On the contrary, it is helpful to understand whether, starting from the civil law system, the logic and structure of the remedy law might benefit, even for the procedural techniques and doctrines that usually shape it, to delineate global models, undoubtedly useful to the international circulation and the recognition of the decision-makers in an increasingly transnational context of civil disputes.

This essay does not involve the more complex and in-depth study on a comparative evaluation of the *res judicata* doctrine through the two legal traditions and also beyond them.[235] On the contrary, it moves from a recent new line of decisions by the Italian Supreme Court that over the years has significantly extended the scope of *res judicata* to some form of the U.S. issue preclusion.[236] Accordingly, it is worth questioning whether this path-breaking line of decisions by the Italian Supreme Court is going to unveil a broader comparative scenario for a prominent procedural remedy law.

It is useful premising that most of the scholarly works on *res judicata* rest on two long-established assumptions: (1) the scope for the preclusive effects of previously rendered judgments in subsequent actions is rather narrow in civil law systems whether compared to the extensive approach that can be found in the common law tradition,[237] and (2) the very idea of issue preclusion is generally said to be absent or rejected in the civil law world.[238] By placing this hermeneutic detour within a broader comparative context, it is possible to challenge the traditional approach and to unveil new common grounds for discussion on *res judicata* also following the idea of a global perspective for a procedural remedy law.

With two landmark decisions dating back to 2014, the Italian Supreme Court, in a specific case involving the nullity of contract, has untied *res judicata* from the strict chains of the parties' claims, in so extending its preclusive effects to prejudicial issues and thereby acknowledging some form of the U.S. issue preclusion.[239] That refreshing lack of orthodoxy

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[235] For some considerations on this general topic, see Cesare Cavallini & Emanuele Ariano, *Issue Preclusion Out of the U.S.? The Evolution of the Italian Doctrine of* Res Judicata *in Comparative Context*, 31 IND. INT'L & COMP. L. REV. 1 (2021), in which it is explored the controversial relationship between comparative law and civil justice through the lens of the U.S. issue preclusion doctrine.

[236] *See, e.g.*, Cass., 12 dicembre 2014, n. 26242 e 26243, Rivista di Diritto Processuale 2015, LXX, 1564 (It.) [Italian Court of Cassation, Dec. 12, 2014]; Cass., 15 maggio 2018, n. 1175, Rivista di Diritto Processuale 2020, LXXV, 411 (It.) [Italian Court of Cassation, May 15, 2018]; *see also* Marcello Gaboardi, *Pregiudizialità in Senso Logico e Comando Giuridico: Il Rilievo del Giudicato nel Giudizio di Legittimità*, 75 RIVISTA DI DIRITTO PROCESSUALE 416 (2020) [*Dependance in Logical Sense and Legal Command: Issue Preclusion Before the Court of Cassation*].

[237] For further reading on preclusion in the United States, see generally JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE. CASES AND MATERIALS 1207 (12th ed. 2018); DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS (2001); Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Edward D. Cavanagh, *Issue Preclusion in Complex Litigation*, 29 REV. LITIG. 859 (2010); Jo Desha Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings*, 50 U. CHI. L. REV. 701 (1983).

[238] *See* CIVIL LITIGATION IN COMPARATIVE CONTEXT, *supra* note 2, at 579–80; *see also* MAXEINER, *supra* note 59, at 230.

[239] *See* Cavallini & Ariano, *supra* note 236, at 30–31. For the purposes of this essay, it is worth briefly noting that pursuant to Article 1421 of the Italian Civil Code, nullity can be

demonstrated by the civil law Italian Supreme Court, is further evidence of the trend towards a gradual extension in the breadth of *res judicata* ongoing in the civil law world.

At the same time, the rapprochement between civil law and common law as to the extension of *res judicata* is a long and complicated process of transformation in need for changes, and the first one to change might be the *legal reasoning* that has undoubtedly inspired the Court, before the legislature and beyond the current rules governing the case.

This new path sees the judge's activism, committed to playing a creative role in the law-making, without having this formant role formally as an institutional and constitutional task. This profile – that is increasingly manifesting within the civil law context – should not surprise and above all alarm, as long as it catches its essence and marks the boundaries.

As the former President of the Italian Constitutional Court eloquently affirms, it is appropriate to overcome the disappointment in the face of the withholding and disseminated creative jurisprudence, framing the growing

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ascertained by a judge on their own motion. Art. 1421 c.c. According to long-established majority opinion in case law, this rule is to be strictly coordinated with the two procedural provisions: i.e., the principle of claim and the correspondence between claim and judgment. Art. 99, 112 c.p.c. Pursuant to the said principles, the court can decide solely based on the complaints filed by the parties. Therefore, in principle it is forbidden from ruling on the nullity of a contract, if the plaintiff has requested, for instance, a termination for non-performance or a rescission. This is because, in such cases, the nullity would not fall within the scope of the relief sought by the party. Rather, it would constitute a prejudicial issue. It follows that, in compliance with the letter of Article 34 of the Italian Code of Civil Procedure, in the absence of a request of a party for a declaratory judgment on that issue or a relevant legal provision on the point, it shall be decided without *res judicata* effects. Art. 34 c.p.c.

The 2014 Supreme Court's decisions challenged this traditional approach. First, the Supreme Court acknowledges the power/duty of the court to ascertain nullity of contract on its own motion, regardless of the specific content of the party's main claim (e.g., performance, annulment, termination, etc.). Moreover, along the same line, it is held that since nullity is provided for in the law in the public and not in the private interest, the court is empowered to declare the (in)validity of contract with *res judicata* effects even in the absence of an explicit claim from a party on that issue.

The Supreme Court goes further. Somewhat represented the new line have been the arguments, as they are spent in the motivation, in the light of the principles of the stability of decisions and judicial economy, with the declared intent of avoiding the serial multiplication of trials: somewhat reminds the need to avoid a continual retrial of claims and issues is linked with rationales underlying issue preclusion in all the jurisdictions. *See, e.g.*, Montana v. United States, 440 U.S. 147, 153–54 (1979) (claiming that issue preclusion protects litigants "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). For a general overview, see generally Linda Silberman, *Finality and Preclusion*, *in* CIVIL LITIGATION IN COMPARATIVE CONTEXT 563–94 (Oscar G. Chase & Helen Hershkoff eds., 2d ed. 2017); Kevin M. Clermont, Res Judicata *as Requisite for Justice*, 68 RUTGERS U. L. REV. 1067 (2016); PETER R. BARNETT, RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW (2001); ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA*: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE (2001).

innovative judicial interpretation of the statutory law "in a more conscious view, of which we civil law lawyers are bearers, the law is not created by any power, not even by the legislature."[240] In particular, it is striking of reasoning (consequence, as the Author himself acknowledges, also of the service to the Constitutional Court) the conviction of the unavoidability, but of the same goodness, of the progressive shift of the jurisprudence from the judge nailed down to the passive role in adapting the law to the fact (according to the syllogistic schemes of the Enlightenment legalism) to an active role in evaluating of the case, by applying the constitutionally oriented order of adequacy and reasonableness. They are both typical canons of common law, as the Author recognizes, already known by the *Ius Commune* during the Middle Age and then discarded by a misunderstood primacy of the statutory law as the unique source for the interpretation of the law.[241]

Therefore, arguing about remedial protection of the civil law system means to consider a couple of factors. First, it means awareness of a new era of comparison in civil procedure and justice as a primary method to evaluate (in the case) the continental system, traditionally structured according to the declarative model of predefined rights,[242] according to canons and principles typical of the common law model of civil protections, as it is the remedy law; and vice-versa. Consequently, having identified a possible ideal *locus comparationis*,[243] worthy of crucial in the international debate, it means to assess its effects in terms of progressive change of the legal approach within the domestic reference system.[244]

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[240] *See* Paolo Grossi, *Pluralità Delle Fonti del Diritto e Attuazione Della Costituzione*, 73 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 763 (2019) [*Plurality of Legal Sources and Constitutional Enforcement*].

[241] *Id.* at 764.

[242] *See* Terry, *supra* note 110; Corbin, *supra* note 110; Bingham, *supra* note 110.

[243] The doctrine of *res judicata* seems to have become part of the general common sense, being it ubiquitous in almost every system of civil procedure. *See Brief Survey*, *supra* note 1. The reason is of course that *res judicata* doctrine is policy driven. As they are secure the stability of decisions and grant certainty of the adjudication (right, or remedy) barring relitigating of the whole claim or of specific issues; and also *res judicata* is recognized both nationally and internationally as a public need since it represents a "private benefit to individual litigants." Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 299 (1929).

[244] The U.S. issue preclusion doctrine – as it has basically been achieved by the Italian civil law Supreme Court – is perfectly consistent with the foregoing policy context. First, it is based on the rather intuitive principle according to which an essential issue that has been actually litigated and decided in a prior lawsuit should not be open to dispute in a subsequent controversy between the parties. Moreover, it operates regardless of whether the second action is on the same claim of the first one (so direct estoppel) or on a different one (collateral estoppel) provided that the said determination was essential to a valid and final judgment. The rights of the party might be waived in the second lawsuit if an affirmative defense is not raised. Thus, it needs a propulsive conduct of the party that desires to invoke issue preclusion as collateral estoppel. For further considerations, see *infra* Conclusion.

Given these considerations, the final question is: why would the growing extension of *res judicata* preclusive effects within the civil law legal systems itself be a symptom and essence of a remedy law, that is, a procedural remedy law?

The attribution of a remedy, while its function is to protect an interest by creating the law by the court order,[245] shapes the same remedy of scope as broad as possible, as final as possible, and in other words, as *remedial* as possible. Within the civil law context, scholars and judges usually acknowledge the function of the civil litigation as the *instrumentality* of the process and its rules for the implementation of the right pre-defined, protected, and declared by the judge.[246] Within the common law *remedial* system, that function is equally gathered with the creation of right by remedy; that has in the object of its order, first of all, compelling and wide-ranging stability to any subsequent disputes.

If the issue preclusion doctrine in the common law context indeed fulfils the function of ascertaining a right created by the remedy, in order to avoid subsequent disputes based on a connected claim, but on a postulate reversal of some issues already litigated between the parties, that remedy is so much more effective and efficient, as it is suitable to achieve economic fairness. In so doing, while the issue preclusion doctrine discourages the party from re-proposing subsequent connected processes by relitigating those issues, it grants to the remedy the most extensive protection for the party who wins the lawsuit.[247]

Therefore, it seems clear to a civil law scholar that the new line established by the Italian Supreme Court – whereas it opens the door to some venues of the U.S. issue preclusion doctrine – adopts a decision grounded in a typical remedy law decision. In particular, such shift by the civil law jurisprudence reflects a natural changing of the legal reasoning, as we anticipated – it is specifically acknowledged by the reference to the limited accessibility of the justice resource as a primary argument within the decision's considerations – a public interest overlaps the private interest of the parties.

Generally speaking, the convincing point of such a procedural remedy law is the significance of the discretionary role of the judge in the civil law decision-making process that allows the consideration of the procedural remedy law as a global model of deciding cases. The progressive change in legal reasoning by the civil law courts, already in itself as the prerogative in

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[245] *See* Zeigler, *supra* note 20, at 71.

[246] *See* Cappelletti & Adams, *supra* note 149, at 1210; Cappelletti, *supra* note 62, at 20; *see also* Cappelletti, *supra* note 102, at 1017.

[247] *See generally* BARNETT, *supra* note 239, at 134; CASAD & CLERMONT, *supra* note 239, at 38.

satisfying the decision-making duty, symbolizes the central role of the judge in the same process of evolution of the legal system as a whole.

Procedural remedy law as a potential global perspective means thus that referring to the criteria of the common law legal reasoning is not the basis of a season of a "protagonist judge", but the basis of a predictable era of change of the "traditional world" towards a "new world," in which the discussion merely on creative judge and the alleged violation of the formants of the law risks not grasping the essence of the matter. That is the answer to the question of substantive and effective justice, which can sound as follows: is it useful, if not necessary, that through the jurisprudence, *res judicata* has a different object and scope in line with that traditionally anchored to the system of rights, and is closer to that of the remedy systems? I believe so, for the reasons explained, but above all I believe that it is not sinful of betrayal of the civil law legal formants provisions: in a more conscious view, of which civil law lawyers should be completely bearers, the law does not create by any power, not even (only) by the legislature.[248]

IV. CONCLUSION

Finally, it might be worth considering a case, recently decided by the Italian Supreme Court within the civil law context, that eloquently shows both the actual meaning and the impact of the considerations above suggested.[249]

It may explain the *res judicata* effect of a decision rejecting the claim for contractual fulfillment because of an exception invalidating the contract itself.[250] Denying the "remedy," the judge declares that the plaintiff has not the right to pre-empt the contract execution by a judicial order.[251] The court ascertains a defect in the annulment of the contract itself, by following an appropriate discovery on the relevant facts and a withholding essentiality of the matter in the suit.[252]

Why might a civil law decision stand in this case as a remedial decision? The answer is that it stands to grant efficiency, in the sense of economic fairness and more generally in the sense of limited justice resources, to the defendant who wins the trial. In denying the remedy to the plaintiff, the extent of the res judicata object to the prejudicial issue of the contract annulment is the most extensive protection for the defendant. The failure to grant the remedy to the facts alleged by the plaintiff in the claim compels that the "second" judge, in action brought on some further contractual effect, to

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248 *See* Grossi, *supra* note 240, at 777.

249 *See* Cass., 15 maggio 2018, n. 1175, Rivista di Diritto Processuale 2020, LXXV, 411 (It.) [Italian Court of Cassation, May 15, 2018].

250 *See id.* at 414.

251 *See id.*

252 *See id.*

consider the issue – already litigated and decided on the annulment of the contract – able to impede further claims based on the same contract.

The rejection of the plaintiff's claim, even within a civil law context, might assume the effect of a remedy law protection, granting broader stability of the decision for the defendant, and assuring economic policies behind the ruling.

The conclusion thus resizes the classical dichotomy between rights and remedies. It leaves out the contraposition between substantial and procedural law, as it did not exist either in the Anglo-American legal systems, nor within the European legal systems.[253] On the contrary, indeed, by the progressive role carried out by the case law's evolution in civil law systems, it might emerge a possible renewed way of evaluating the primary structural difference between the two legal traditions.

In these terms, it is worth finally noting how the new civil law trend on *res judicata* extension appropriately reminds one of the fundamental cornerstones of the American legal system, as it is the qualification of the Civil Procedure Federal Rules as trans-substantive rules. Even though trans-substantivity has recently gone into a rethinking, due to an increasing set of substance-specific procedural rules coming from the political process,[254] however, the feature of this plank of the American legal system keeps unaltered its essence: namely, "a value-neutral, court-supervised rulemaking process."[255]

Hence, even if it is true that trans-substantivity means until now a "significant value choice in procedure belongs in the legislative arena,"[256] the concept of a "procedural" remedy law may be the way in which civil law adjudications assert themselves in a global litigation context. It can occur by reducing the gap between the two legal families even from the perspective of the issue preclusion doctrine. The judges, even in civil law systems, signal thus something else to their audience (i.e., citizenship), the values and incentives they want to achieve with their rulings. We could say that it is true *a fortiori* for the above mentioned Italian legal trend. If the incentives in issue preclusion reside in the efficiency of a courts' system and management since the parties are in the best position to protect their interests, here the overreach of issue preclusion also goes to the parties in privity.

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253 *See* MAXEINER ET AL., *supra* note 59, at 241.

254 *See* Dodson & Klebba, *supra* note 155, at 24.

255 David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 399 (2010); *see also* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2017).

256 Marcus, *supra* note 255, at 419–20.