Public law and Constitution

Public law disciplines government and other public authorities' organizations, regulates their activities (internal and in front of private persons) and imposes to private persons the behaviour they have to maintain in accordance to the collective interest. Simply, it aims at regulating relations among public bodies and citizens in order to protect collective interest.

It's divided in 4 main branches: constitutional law, administrative law, fiscal law and criminal law.

The constitution was written in 1947 and entered in force in 1948 as the supreme law of the Italian legal system, influencing private law by setting the fundamental ideology concerning private relations and as a consequence a private law's source. In fact, is very much emphasised the importance of inviolable rights and their nature, which is recognised as pre-existing. Some examples are provided by art. 1,2,3,35 (right to work, labour relations and work as a personal development), 13 (privacy of correspondence, inviolability of person and his/her home), 29 (protection of the family as a natural association and the duties of parents towards their children), 32 (right to health).

There are also rights involving the economic sphere, which are contained in art. 41 for business enterprise and 42 for individual propriety. These are components of free economic activities that must be exercised in regards of their social utility, safety, dignity and freedom of workers and citizens, providing a strong social content.

The constitution gives a clear distinction of private and public, but they're often involved with each other. The competition is regulated in a way that ensures freedom but also limiting and avoiding damage to public interest.

Vertical influence: The constitution, as the higher-ranking law, cannot be contrasted by provisions promulgated by the parliament. There is a special body, the constitutional court, which main priority is invalidating the lower-level provisions that contrast the Constitution. Europeans' laws and regulations are the only ones that can be seen as of a higher level.

Does the constitution horizontally influence private relations? Yes, take for example of right to health: private relations (observing physical and mental integrity) and public relations (offering the service).

The legal system

All modern countries adopt some rules and norms that are directed to humans which have to adapt to a certain behaviour, which can be compulsory/prohibited/lawful. This ''guide lines'' for behaviour are classified in: personal (referring to a specific person), factual (referring to a specific situation), general (whoever finds himself in a situation) or abstract (pictures a situation envisioned). In order to enforce these rules, governments apply sanctions of different types: civil, criminal or administrative.

The sources of law are: written and unwritten (the first one are acts of the parliament and for the latest case law), legal sources (coming from previous hearing held by judges in the case of case law or by a judge that applies law jurisdiction) or legislation (for which an authority with legislative power draws texts).

Sources of Italian law and EU law [hierarchy]

The civil code lists the sources of Italian law in art. 1 of preliminary provisions; but firstly, it's important to note that the civil code could've not included the constitution as one of the sources, and more importantly the main source, as it became effective 6 years (1948) after the promulgation of the civil code (1942).

-ordinary law: which are all the acts that have the force of law

-status/acts of the Parliament [art.70 Cost]

-legislative decrees (Parliament delegates legislation to the Government) and decree law (in cases of extreme necessity and urgency, has immediate legal effects and has to be turned into statutes within 60 days) [art.77 Const.]

-regional law and laws of autonomous provinces of Trent and Bolzano, which are administered by the region itself but within the jurisdiction of the State. Conflicts are resolved by involving the Constitutional court

-referendums [art.75 Const.] which are partial or total repeals for laws/other acts with legal force requested by 500000 citizens or 5 regional councils, with the exception of matter like tax laws, amnesties and pardons and ratification of international treaties.

-domestic regulations, which are on a lower level and are made by council of ministers, ministries, regions, municipalities

-customs and usages, for the former the pattern of behaviour must be general, repeated and constant and all the members of the community must observe it as bound and ''rule of behaviour''

It's important to mention that Italy has to regulate and conform its jurisdiction to European laws, as it's a member state. All EU sources are integrated into the Italian system.

-Treaties, starting from the oldest (TEC) to the most recent held in Lisbon in 2007 (TFEU), establishing the constitutional bases between the UE and member states. The core treaties are the Maastricht one, the Rome one and the Lisbon one.

-regulations, have an immediate and direct effect on member states and prevails in case of diverging

-directives, are objectives set in order to conform the legislation of every state member to the European one, and every country is free to choose the way to integrate them in the legal system.

The hierarchy of all the sources: -the Constitution, which with art.10-11-117 recognises the internationalist principle

-the Treaty on the functioning of EU and all the other sources of EU's law

-laws of state, regions and autonomous provinces of Bolzano and Trent and every other equal legislative measure

-domestic regulations

-customs and usages

Private law, sources and branches

Private law is the legal system that regulates economic relations among privates, by which we include also the public bodies, and private interest. Using law to regulate these relations is a way of limiting freedom in order to achieve social purposes or goals of public interest. All the principles of private law are based on the Italian constitution.

The internal/domestic sources of private law are: the constitution and constitutional laws (promulgated with a special procedure), ordinary laws (including decree laws and legislative decrees), regional laws (enacted by different regions), regulations and usages.

Private law considers the relations between private persons, and it's divided into two main branches

-civil law, concerned with all relations between privates and not necessarily involving economic activities but simply to satisfy personal interests with the exception of
-commercial law, concerned with the economic operations pertaining commerce, industry and professional activities (all parties must be commercial)

→ -employment law indicates all the individuals and collective relations pertaining to subject of work

The history of the civil code

1865: the civil code included relations among civilians only

1882: promulgation of the commercial code, which included rules regarding traders only
1942: promulgation of the Civil Code, which included both commercial and civil law and that is still used nowadays.

It changed from a static interest (with the previous codes) to a dynamic attention to economic enterprise. Even if it was promulgated when the fascists had power, the intellectuals were not influenced by them at all, and that's why it is still used. The principles of the civil code are freedom in economic matters, a view that is typical of liberals and based on laizzes-fair economy. On the other hand, civil rights were still strictly limited and private relations were controlled. The constitution, the other source of private law, repeats the concepts contained in the civil code, adding just a few limitations, which were mainly introduced to protect collective interests.

The civil code is made up of 6 books, each book is divided into headlines, and each headline include items.

- Persons and the Family
- Succession
- Property Rights
- Obligations
- Labor
- and Protection of Rights

There are special legal provisions that are involved in economic relations between consumers and companies, which are the consumer's law. They're rules set in order to protect persone fisiche from persone giuridiche.

The role of the judge

The role of the judge in private relations is to apply the law to resolve conflicts by interpreting the law itself, by applying it in the most historically appropriate manner and applying the general principles of:

-good faith, refers directly to the privates and their duties of fairness integrating law provisions

-public order, totality of peremptory principles on which the legal order is based

-public morals, which is the entire range of social and moral principles on which a society is based

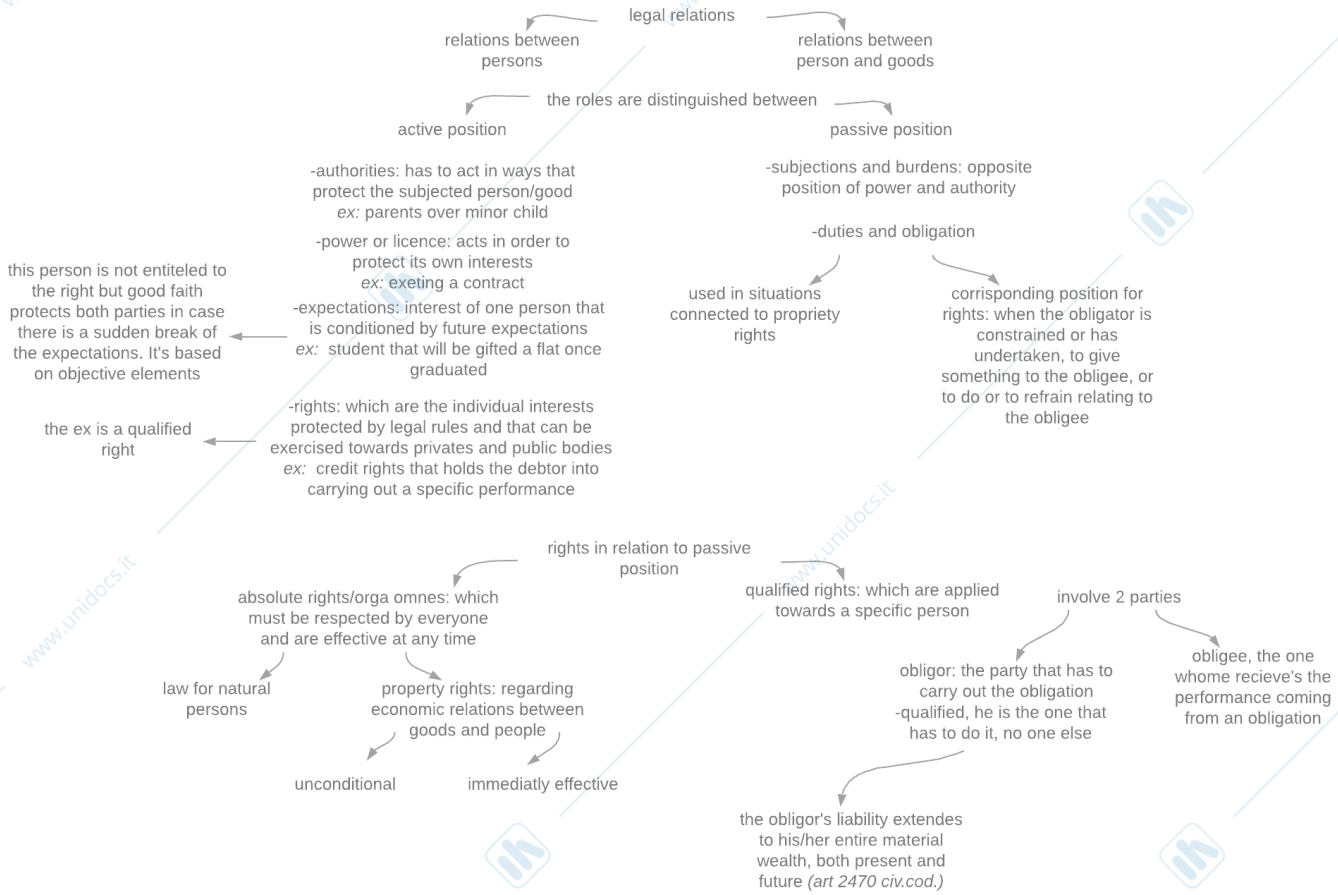
In addition to all of these ''always in force'' general principles there is general equity which establishes justice in some particular cases, like for the evaluation of damage, integration of contracts and in many special forms of contracts, for situation in which using the right provision would create injustice. General equity is a personal criterium and purely subjective, whereas good faith is always in force.

Legal provisions, when applied by a judge, transform from abstract and general (a certain situation described and not referred to a specific person) to concrete and individual (applied by the judge and effecting only the people who committed those actions).

When juridical rules are not respected, there are consequences also called sanctions, which can be distinguished in civil san, criminal san and administrative san.

Legal provisions can also be distinguished in the ones that can be derogated (such as non-mandatory rules and substitutive rules, where contracting parts are left free to decide or they leave a gap in the contract) and that cannot be derogated (given by external limits, such as the unlawfulness of contracts).

Legal relations and positions



Property rights acquisition/loss

These types of rights related to things, which are the objects on which the rights are exercised. Those rights have a particular characteristics: fulness (so including all parts of the good), inherence in rem (inseparability of the right form the thing) the right to trace (right to follow the good) and the expansion/elasticity (when the object of right stops being subjected to a third person's temporary right, the compression ends and it expands itself again) and specificity (the only propriety rights admissible are the ones listed in the civil code) . The third book of the civil code is entirely dedicated to the right of ownership and other rights of propriety, in particular art.832 states that ''*the owner of the thing has the right to enjoy and dispose of the things fully and exclusively, within the limits of and the observing the obligations by law*''. This underlines the total freedom of ownership in every form, but stating at the same time that that enjoyment must be in alignment with legal provisions. Analysing the article more deeply:

-Enjoyment, refers to the manners by which the owner extracts any utility from the thing, by collecting either natural or civil fruits

-Disposition, refers to the fact that the property is disposable in any way possible, by selling, granting the rights to someone else or by giving it away

Both of these prerogatives are to be exercised fully, with the only limitation of law, and exclusively, meaning that the owner has an absolute right over the thing. The private limits are listed in the CC, whereas the public limits, protecting the collective interest, are listed in the Constitution.

The same owner of the right might imply some differences in the right: in fact, someone which holds incapacity to act, cannot freely enjoy or dispose of their propriety. In case of legal person or collective entities, the right might be limited to certain things and not to everyone.

There are also, specified in the civil code, some ownership rights, which are defined as limited rights, as the enjoyment is referred to a specific person which has limited, compared to ownership, rights to enjoy the property.

-Usufruct: the usufructuary has the right to enjoy the propriety but must respect its economic destination. The usufructuary has the duty to return the thing upon the term, exercise the reasonable care of a good pater familias, draft an inventory of the expanses, pay expenses related to the custody, management and maintenance of the property.

-Use: entitles its owner to make use of the property and to exclusively collect its fruits to the necessary for their and their family's needs

-Habitation: consists in the right to inhabit a building owned by another party within the limits and needs of the rightsholder and them family

-Praedial servitudes: It's a particular circumstance that arises in the case of two close lands, having different owners, for which a burden is imposed to one land for the utility of the other. The dominant land would be the one that benefits from the establishment, and the servant land is the piece of land subjected to servitude. Servitudes are in this case a limitation of the right of ownership for the servient land. Servitudes are constituted voluntarily, by prescription or compulsorily, and for the latest case the civil code provides the circumstances of applicability: right of water, cableways and when a piece of land is surrounded by another land and has no access to public road or its owner cannot acquire access without excessive expenditure or inconvenience. Servitudes cease to exist only in the cases of mergers (both lands share the same owner) or by limitation (the servitude is not exercised for a period of 20 years).

There are also situation for which ownership is related to two or more people, which hold common ownership, and it may be voluntary (people agreeing to share a thing), incidental or forced (owners of a flat in a building have common ownership of the roofs, its foundations ecc).

Propriety rights give complete freedom to the owner of the thing to do anything he wants with it, observing the limits and with observance of the duties established by the law. We must take into consideration what will be said in the paragraph referred to ''*Abuse of rights and art. 833*''

Propriety rights can be acquired in two ways and so classified in two ways:

-derived title: when there has been a relationship with the previous title-holder (based on transfer)
-originating title: when the title has not been obtained from an existing title holder, but it's constituted autonomously by the possessor

Both ways must be sufficient and valid. The loss of rights can be caused by:

-transfer, when the seller's right is lost due to it being transferred to the purchaser

-limitation, when the person entitled to the right does not exercise them within a period of time prescribed by law, the most common is a 10-year period

-lapse, as a result of the passage of time or failure of a condition or a change in circumstance

-other causes, such as following a sanction or a compulsory purchase

The gain or loss of propriety rights comes from: occupation, invention, accession, specification, union or commixtion, usucapion, result of a contract, by succession at death and any other way established by law

Usucapion: using things as if you were the owner per 20 years (originating title)

Succession at death: similar to the contract as of the effects but completely different in the transferring process

Abuse of a right

We said that every right is based on freedom, and that there are just a few limits that, as said by art. 832 (within the limits and with observance of the duties established by legal orders). In addition to that, the emulative act, art. 833 civ. cod. indicates that the owner cannot perform acts that have any purpose than that of harming or causing annoyance to others. So, in other words, a right cannot be exercised in ways that damage others intentionally. Doing that results in the so-called abuse of right: which occurs when there's not good faith.

This abuse can be applied to any type of right, from ownership to credits rights, and it is called abuse only and only if its main purpose is to damage other parties.

The law of contract [art.1321]

Contract is an **agreement between 2 or more parties to establish, regulate or extinguish a legal relationship having patrimonial content**, which means that can be economically evaluated, among themselves. This indicates that the main goal of contracts is to regulate the conduct of the parties involved and for that reason it can be said that it **has force of the law** between the parties. Contracts are an instrument of **freedom** of private autonomy, as parties are free of deciding the content of the contracts **within the limits established by the legal order** (public order, morals, compulsory provisions) and of contract, related to the type of contract among the ones listed in the civil code.

Contracts produce two different types of effects, as they generate obligations or transfer ownership or establish or transfer other rights in propriety and even both at the same time. *Ex: sale of a thing*

Lawmakers set essential elements that a contract must have to not being null: the subject matter, the form, the agreement and the consideration/causa.

The agreement: is the essence of the contract, which is based on the parties involved, which must be vested with the capacity to act, and the will to enter the binding relation. This will can be either expressed explicitly, written or spoken but also gestures, or implicitly, when the objective conduct of the parties indicates their will to enter into the contract. Entering the contract is based on the exchange of offer and acceptance, for which we can associate the offeror for the former and offeree for the latter.

The causa/consideration: is the main reason for which the parties entered the contract, so the benefits bargained. It is considered unlawful when it does not conform to mandatory rules, public policy, morals or it is used to circumvent the application of a mandatory rule, and it leads to nullity of the contract itself.

The subject matter: is the service or good for which the parties are bargaining. It must be possible (physically and technologically possible), lawful (conforms to mandatory rules, public policy and morals) and determined or determinable (the object must be well defined or easy to determine by the contract).

The form: is the way in which parties can express their consensus. The Italian legal system applies the principle of form, which means that parties can express their agreement in whichever form (written or verbal), and specific forms for acts or facts are specified by the CC. For the contracts that require a written form there is further distinction:

-simple written form, requires the signatures on the document *(transfer of right of ownership)*

-written form with authenticated signatures, the signature of the person to whom the document is imputable has to be authenticated by a public official (a notary) *(entry the Land Register)*

-written form whose content has been authenticated, in addition to signature authentication, the public official must ensure that the content of the document corresponds to the will of the parties. If the public official is found to be incapacitated of incompetent, the document id converted to and has the same value of a simple written form.

Contracts can be classified in typical (contracts regulated by the legal system) or in atypical (not previously provided by the legal system). Atypical contracts are either way subjected to the general rules as any other type of contract that is typical; they are different from mixed contracts, as the latter are a distinct category that combines different features of typical contracts.

Contractual autonomy and its limits

As stated before, the legal system is based on regulating aspects that do not include private life, and we can observe a further type of freedom in the contracts, which is the contractual autonomy, based on economic liberalism, which allows people to pursue the economic ends that they wish. This freedom is limited in order to protect:

-specified interests, held as prevailing over the free market, that means that, as stated by the const. the freedom in economic activity may not conflict with social utility or prejudice human safety, freedom and dignity (urban planning, education, health, protecting the environment or branches of industries)

-free competition, providing antitrust rules and setting limits, regulating mergers and acquisitions, and controlling the bigger corporations (press and television)

-weaker parties in the market, which highlights that contractual freedom does not come from equal bargaining power, but rather protect the weaker parties participating in the contract.

Conclusion of contract

The will coming from the two parties and the two components of declaration of will, which are the proposal and the acceptance, lead to the agreement. The proposal comes from the party that has more freedom, as they propose all the characteristics that he chooses, whereas the other party is more constricted, as it must be in compliance with the proposal, have the same form and accepting the fixed term. The contract is officially said to be closed when the proposer is aware of the acceptance of the other party, trough reciprocal knowledge or the presumption of knowledge. There are other ways of closing a contract:

-the contract foresees an obligation only for the offeror and the recipient doesn't expressly refuse it. This is the case of donations or gifts

-when the execution of the obligation precedes the acceptance, making the contract closed at the time and where the performance began

-with mere consent, when there is the need of simple agreement, expressed by their behaviour, to let them have effects

-with the delivery of the goods object of the contract

Irrevocable offer: when the revocation of the offer can be done by the proposer until the contract is closed unless the proposer binds himself to the offer for a fixed period of time, case in which he cannot withdraw in, keeping the offer fixed, guaranteeing the acceptor the time to think of the offer.

There are different types of contracts:

-Option: when parties agree that one is bound to his/her proposal and that the other is free to accept it or his reject it, the proposer is deemed as an irrevocable offer. It is not a common type of contract and it's used in the financial market

-Pre-emption: where the offeror binds himself to address an offer to a certain person first in case, he decides to enter the contract. In order to apply it, the offeror must use a notice (denunciation) and the buyer, in order to acquire the right, must pay for it. Pre-emption can be voluntary or statutory.

-Offers to the public: where the offer, represented by a contract with all of its cardinal requirements, is made to unspecified people. This is different from the promise to the public, which is a unilateral act where the promisor is obliged to the performance once it has been expressed to the public.

-Preliminary contract: creates obligations, more specifically, forces the parties to stipulate a definitive contract within a prescribed time. The due performance is represented by the stipulation of the definitive contract. The non-compliance of the preliminary contract gives one of the parties, the one that did not breach the definitive contract, the right to dissolute the contract and to obtain compensation of damages, but also the possibility to ask a judge, if it is possible and not excluded by the agreement, to start a procedure that has the same legal effects as the ones of the definitive contract, which has not been concluded. In order to prevent the seller to transfer the promised good to someone else, a registration at a public office of the preliminary contract can be done, in particular for contracts that concern immovable things or for the transfer of minor propriety right on immovable things.

Preliminary contract and pre contractual liability

The negotiation of a contract is completely free, but the law imposes the **duty of fairness**. In case of breach of this duty there is **precontractual liability** to the party who is not negotiating fairly, which must compensate the damages (lost chances and supported costs). On the other hand, **contractual liability** occurs when there's breaching of the contract after its closing and that is a direct effect of the debtor not employing the normal due diligence.

Cases of precontractual liability:

-unjustified breach of the negotiations, one party does no longer want to continue with the negotiating process but some costs have already occurred and the other party lost an opportunity

-omitted information on a reason of contract invalidity, it's usually an omission caused by fault and there is not intention, if there was it must be proven

-fraud during the negotiation, which aimed at the closing of the contract in unfair conditions with omission (negative act) or commission (violating the professional duty of fairness).

Validity of contract

Contract can be defined as valid when they conform to what is prescribed by law and so have a binding force, or invalid, when because of various reasons they do not hold any legal effectiveness nor binding force.

Invalid contracts may either be:

-void, as they do not produce any legal effect and they are for this reason automatically null, because they're are contrary to mandatory rules, do not hold one of the cardinal requirements, with unlawful or impossible causa or subject matter. Its invalidity derives by law, and so by a declaratory decision.

-voidable, which produce legal effects until their invalidity is declared by the judge with a constitutive decision, are contracts closed by party lacking capacity to act or effected with defects of consent. They produce legal effects until the judge declares its nullity. Incapacity to act related to contracts includes minors, persons subjected to court interdiction and interdiction at law and contract entered by relative incapacities of extr, adm. that are not assisted by the guardian.

The effects of voidable contracts concluded with vices of will are:

-mistake [art.1427] observes the case of distorted consent, which comes from a false appraisal of reality. The interest of each party of entering a contract with no mistake is not respected, and for that reason it can be as voidable. The mistake leading to the distorted will can be impeditive (the mistake occurs in the declaration, which has been wrongly manifested – will of purchase, but ordering a larger quantity) or fatal (which concerns the formation of will - did not understand at full the circumstance of the contract and so the real objective reality), which can be based on facts (related to external circumstances) or on the law (related to the existence, scope or applicability of a legal rule, which was the only reason to close the contract -contract for building an house and having the constructor rely on the fact that he knew the land had a permission of building, when in reality there wasn't). A mistake, in order to make a contract voidable must be fundamental, and so effect a fundamental aspect of the contract [such as the nature, the subject matter, crucial characteristics of the subject, the identity or characteristics of the other party crucial], and manifest [it must be recognized or recognizable by the other party that acts without due diligence].

-Fraud (Dolo)[art. 1439] observes any deception, dishonest behaviour or trick that leads to deceive the other party, making a party fall into mistake. This deception is put in place by omission (by withholding some information) or by commission (with an act). EX Vanna Marchi
Fraud must be fundamental (without the presence of the deception the contract would've not been concluded) in order to be void, or incidental (without the presence of deception the party would've still entered the contract but at different conditions), in which case the contract is not voidable but the deceived party can claim for compensation of damages

-Duress (violenza) [art.1434] one party exercises threats or pressure to induce the other party to enter into a contract, as they fear unjustified damage to their person or propriety. To render the contract voidable, a threat must be serious (has to have a certain importance and represent a serious threat) and unjustified

Rescission [art.1447]

It's a cause of invalidity of the contract and it's a remedy against exploitation by the other party which is declared through a court decision in case of a contract stipulated:

- in state of danger (when the party agree to iniquitous terms, taking advantage of a state of need known by the other party and in order to save him/herself from a dangerous situations)

-gross disparity of presentation (when there is gross disparity between performances [in fact one's value must be more than half than the other one] in order to obtain an unfair profit or because one party exploited the other's state of need.

The action of rescission lapses in one year from the day in which the contract was closed and it cannot be validated by the exploited party, but the party taking advantage of the other can modify the contract's terms bringing them in a balanced contract.

Nullity of void contracts is absolute and does not have any time limitation period, as anyone who has interest in the contract is entitled to make a claim and there is not deadline to such claim, if not for adverse possession and time period for restitution.

Discharge of the contract [art.1453]

It's a way of resolving a contract by cancelling its effects. The three causes of discharge are non-performance, supervening impossibility and supervening unconscionability. The original balance of the contract's balance is influenced by these circumstances, being valid in the beginning and making the performance of one of the parties no longer justified.

-Non-performance: one party doesn't perform their performance and so making the other no longer obliged to perform his part of performance

Requirements for judicial discharge: the complaining party must have performed his performance; the discharge will be obtained only with the constitutive decision of the judge, and once the request is made the party requesting the discharge cannot ask for the performance anymore; the serious demonstration of non-performance of the other party, which is the key of the legal provision, as the judge checks that the non-performance was relevant and required for the discharge.

Automatic discharge (de jure), used because they lead to discharge without having to make a claim to the court: -the presence of a cancellation clause and its use by one of the party with the simple expression of intent makes the contract discharged; -when the time of performance has an implicit or stipulated by the time set bearing on the contract; -after there has been a further written request by one party and setting a time limit, after which the contract is automatically discharged without further notice.

-Supervening impossibility: when one performance becomes impossible after the conclusion of the contract, this impossibility is not imputable to the party that was obliged to execute that obligation. Since the contract is reciprocal, if one performance becomes impossible the other has no reason of existing and so the contract loses its causa and so there is a de jure discharge.

-Supervening unconscionability: in cases in which contracts are severable or continuing or with deferred execution, making the performance so onerous that is inconsiderable to ask for its fulfilment. The party that is bounded to the onerous performance can claim for the discharge of the contract and the other party can avoid the discharge by offering different terms to bring back an equitable situation. It is not a de jure discharge case. As in rescission there is a great inequity.

The effects of discharge: -retrospective as regards the parties

-does not affect rights acquired by third parties

-for several or continuing contracts discharge does not disturb the effect of performances that have already been carried out, as they were justified

Obligations

Obligations are created when an obligor who is obliged to behave in a specific way towards the oblige. So the obligor, the debtor, must carry out a performance and the oblige, the creditor, which holds a qualified right (referred to a specific person). This behaviour can consist in *do to something, to refrain from doing something or to give something.* A debtor is defined liable for the obligation with all of his present and future asset, hence if the debtor failed to carry out the performance, the creditor may bring legal actions against the debtor's propriety.

In carrying out the performance the debtor and the creditor must behave in **good faith**, that is according to the rules of fairness. Adding to this the debtor must act, while carrying out the obligation, with the ''**diligence of good pater familias**", so behaving in conformity to what is considered to be right and proper. The lack of diligence implies negligence by the debtor.

Due diligence by the debtor can be observed for:

-the result deriving from "best-efforts obligations" (for professional like layers and doctors. In this case due diligence is not sufficient to demonstrate that the debtor is not liable;

-the means, deriving from "obligations of result" for the former, the exact performance tends to coincide with diligent conduct, regardless of the achievement.

In order to define the "exact performance" there is need of specifications: method of performance, time of performance, place of performance, the nature of the performance, who carries out the performance and who is the person receiving the performance. In relation to the last point, there are situations for which the debtor is not found liable of non-performance, in the case of payment of a certain sum of money, and asked to pay again the debt if it can be proved that: there were unambiguous circumstances, there was good faith of the debtor and that there was a faulty conduct by the real creditor.

In any other case the debtor that doesn't carry out the exact performance is found liable for the damages, unless he proves that the non-performance or delay was due impossibility of performance by causes non imputable to him. The requirements for impossibility must be: objective (must not depend on the particular situation of the debtor) and absolute (so strong that it made it impossible to carry out the performance in any other way possible). The causes of non-performance have to be of force majeure, result of acts of authority or by unforeseeable circumstances.

There are 3 main types of obligations:

-alternative, for which the debtor is obliged to carry out either one of the two specified performances;

-elective, when the debtor has to carry out a specified performance and is granted the right to discharge the obligation by carrying out a different performance;

-indivisible, the object in matter cannot be subjected to division

The sources of obligations are given by: contract, illicit acts or any other action or instrument qualified to give rise to an obligation.

Performances/Obligations and good faith

As defined in the civil code in art. 1174 performances have to have an **economic value** and must meet the expectations/find the corresponding interest of the creditor, even if not patrimonial. The obligor must perfrom or behave in a certain way towards the creditor, who has the right to claim the performance.

As stated by **art. 1175**, in carrying out the performance the debtor and the creditor must behave in **good faith**, that is according to the rules of fairness. Adding to this the debtor must act, while carrying out the obligation, with the ''**diligence of good pater familias**", so behaving in conformity to what is considered to be right and proper. The lack of diligence implies negligence by the debtor and so liability [art. 2740].

Non-compliance [art.1218] and obligor's default

The performance must be carried out and to be "exact", so due performance. If the debtor does not perform his/her obligation, then there is non-compliance, which can be distinguished in:

-partial performance

-delay in performing, when the obligation is not carried out within the period of time established in the agreement

-default by obligor, represented by the delay in performing and also requires a written notice to perform addressed to the obligor from the oblige, in order to bring to an and the state of uncertainty. It is obvious that the default cannot apply in cases of obligations to refrain from doing. There are cases in which default arises automatically: -from an illicit act,

-when the obligor has stated in written form that he no longer has the intention of performing the obligation

-when the time to perform has expired and it was an obligation to be carried out that the obligee's address (which nowadays is represented by the bank account for a payment)

Effects: -the debtor must compensate the damages

-if the obligation consisted in the payment of a sum of money, the debtor is liable to pay delay interests form the date of notice

-if the debtor does not perform within the agreed terms and then it becomes impossible, he will be still considered liable for damages, even for causes out of his sphere of control, unless he can prove that the goods would've perished at the creditor's place too.

-in the case of a ''unreplaceable thing'', the creditor can obtain forced delivery.

-in the case of replaceable thing, the creditor can ask for the coercive enforcement of the performance, that is satisfying his economic interest by expropriating the propriety of the debtor and putting it up for sale.

-in case of ''refrain from doing something'' performance, the creditor can ask for the destruction of the thing that violates the obligations at the obligor's expanses.

Creditor's default

On the other hand, there could be the **creditor's defaults**, which occurs when the due performance is not carried out because of some failures coming from the creditor such as refusal of cooperation or of performance. In order to put the oblige in default, the debtor must put in a written official offer; if not done formally, the debtor will not be at fault but the creditor will not be too, and so there will not be any compensation for damages. The effects coming from creditor's default are:

-oblige must refund loss or expenses incurred by the debtor

-the debtor does not hold any interest for the delay in performance

-the debtor's performance is no longer due

Compensation for damages [art.1223]

The non-performance clearly produces damages and so the party which is entitled to it can receive a compensation coming from those damages, which are *direct and immediate consequences* of the non-performance or delay and that caused *actual losses and the lost profit*, which is the profit which could've been made if the performance had been carried out. The valuation of the damages is not easy and so in determining it there is need of observing the causation, based on 2 rules:

> -Condicio sine qua non: Mark has to go to Rome by train, but the taxi driver is late and he misses the train. He buys a ticket for the next train, he gets on and suddenly the train has an accident; he gets hurt and goes to the hospital, where there is a court circuit and he risks his life. CONDICIO: delay of the taxi driver.
>
> -Theory of adequate causation: it is made to fix the previous rule. We have to consider the probability of an event to cause that consequence. In our case, the delay of the taxi is not obvious to produce the consequences regarding the physical harm to Mark; the taxi driver will indeed only pay for the ticket of the second train. The one that is responsible for the train accident, is Ferrovie dello Stato, and the one responsible for the accident happened in the hospital is the hospital itself or the provider of electricity.

Compensation of damages caused by non-compliance is also limited to the rule of foreseeability [art.1225], for which compensation of damages is limited to those motives that could've been predicted at the time of the agreement, unless the non-performance was intentional, for which the compensation extent to unpredictable damages too. When damages cannot be quantified in their exact amount, it is equitably liquidated by the court.

In case of contribution of the oblige in the causation of his damages, coming from lack of good faith/due diligence, the compensation will be reduced according to the seriousness of his own negligence and the extent of the consequences arising from it.

Termination of obligation

An obligation is considered terminated when the due performance has been carried out by the debtor, but we can also observe other situations of termination, that end with non-compliance:

> -Novation, implies renewal of the agreement between 2 parties in the same obligation, terminating the first one and entering a new one, by substituting the original obligation with a one with new object (the obligation terminates when the parties replace the original obligation with a new one) or new obligor.

Novation's not effective if the original obligations does not exist, but if it was voidable, novation is valid if the obligor has renewed it knowing the vices of the original one.

-Release the unilateral declaration by which the obligee declares to the obligor his intention to renounce to his debt; as soon as the intention to renounce is noticed to the obligor, the obligation terminates unless the obligor declares that he does not want to renounce to it.

-Supervening impossibility, arsing after the formulation of the contract.

-Limitation

And the ones that produce satisfying means:

-Set-off: when the two parties have obligations towards each other and the two obligations partly cancel each other out.

-by operation of law, when the two debts must be in the same form of money or quantity of fungible things. The both must be liquid (of a determined amount) and payable (not subject to any condition). The set off is declaratory.

-judicial set off, the two debts must be in the same form of money or quantity of fungible things. They both have to be payable, but one must be liquid and the other is easily liquidated. The set off is constitutive.

-voluntary set off, the parties observe the previous provisions and establish their own conditions

-Intermixture: the situation in which an obligor becomes his own obligee or conversely, when an obligee becomes his own obligor. This situation occurs in cases of debtor buying from a creditor a credit. Intermixture does not operate in disadvantage of third parties who had acquired some rights on the credit.

Plurality of performances

Obligations might require the debtor to carry out multiple performances, having a primary one and secondary performances. In the case of alternative obligations, a single obligation covers two or more subject matters and the debtor is obliged to carry out one of the two, discharging the alternative one by performing the other. Elective obligations occur when the debtor is obliged to carry out a specific performance but is granted the right to discharge his obligation by carrying out a different performance.

There are particular obligations, called indivisible, as the nature of the act or thing does not allow division is any way, and for that reason all the performances related to that thing are governed by the ''in solido'' laws

Plurality of debtors

An obligation might include different people as debtors, in this case the obligation can either rise:

-joint and several liabilities, when one of the debtors carries the performance and claims from each of the debtors the respective share of the overall obligation

-limited liability, where each debtor is liable only for his share of the debt (the position of each debtor is distinct from the position of the other debtors)

In case of non-performance the debtors are bound ''in solido'', which means that it will rise joint and several liabilities, but that does not survive in the case of death of the debtor.

Plurality of creditors

A performance might be carried out in favour of multiple creditors: when the obligation is in solido, each creditor has the right to receive the performance in its wholeness (with the consequence that the debtor is discharged towards all the other creditors), but when it is not ''in solido'' each creditor has the right to demand satisfaction only of his share.

Plural creditors have the right to demand the share in case of compensation for damages of the thing and also the potential money, corresponding to their share, of the thing sold.

Persons

Society is composed of people, which can be individuals (natural persons) or organizations (artificial persons), and they're all subjected to law, and as so they are: vested with rights and duties and have the ability to enter legal relationships.

Artificial person is a designed variety of entities, which are distinguished in legal persons and collective entities. They are both groups of people that united and established for a specific purpose and in pursuance of specific interests. Legal persons are: registered associations, foundations and capital companies (stock companies, limited stock companies and limited liability companies). Collective entities are: non registered associations, committees, partnership companies (simple company and company in collective name)

All natural persons are entitled to the legal capacity, eligible to have rights and duties, and this originates from the right to citizenship, freedom and family established in the '600s and it is still protected by the 2 art. Cost. Legal capacity is so recognised at birth and gets lost at death. [art. 1 cc]

Natural persons are also recognised with capacity to act, which is the capacity to perform any act, except the ones for which a higher age is required, upon attaining the legal/majority age. [art 2 cc]

The identification of a natural person is also extended to the domicile, the principal canter of his interest and business, and the residence, also known as the habitual abode.

Capacity to act

Capacity to act is granted to all-natural persons that have reached the age of consent specific to each country, but there are a few exceptions, the so-called **absolute incapacities** to act:

-minority, attributed to minors and for which parents are usually the legal representatives

-judicial interdiction, attributed to people who are routinely impaired in their mental ability

-interdiction at law, attributed by law to those who are sentenced to an imprisonment term exceeding 5 years, and it is seen as an additional punishment

There is an additional distinction, as there are also the **partial/relative incapacities to act**, recognised for:

-emancipations, coming from a petition a minor who has turned 16 and that wishes to be given permission to get married. The authorisation to marry, and so obtain partial capacity to act, is granted if there are serious reasons. As the capacity to act recognised is partial, acts are limited to those of "ordinary administration" (ordinaria amministrazione), and so limited to, for instance, keep the same economic destination of a good. *Ex: a lake house cannot be transformed into a residence, as it would be considered an act of extraordinary administration, but can be rented or renovated.*

-limited conservatorship, a condition judge by a court in cases of routinely abuse of alcohol or drugs, excessive profligacy or if the person was blind or deaf at birth. These impairments are not deemed serious enough to warrant judicial interdiction.

Natural incapacity

Natural incapacity is defined as the lack or inability to understand or intend and is a cause of annulment of any legal act performed, but that happens if:

-the natural incapacity existed at the time the legal act was performed

-it's the case of unilateral act, as it was seriously prejudicial to the person that was not able to understand or intend

-it's the case of a contract, for which the other party acted in bad faith and knowing that the contractual party was lacking the ability to understand at the time of the stipulation of the contract.

Extracontractual liability [art.2043] (tort)

It's defined by any intentional or negligent act that causes unjustified damage to others, requires the oblige to compensate the damages. Tort is not a consequence of a contract, as there wasn't previous contractual relationship, but arises liability just as contracts do.

The requirements for extracontractual liability and consequently the compensation of damages is an obligation provided by law [art.1173-2043] are:

-commissive (positive) or omissive conduct, acts that happened or that were omissive imputable to the tort visor

-intent and fault, for intentional or malicious acts are subjective elements

-unjustified injury, the act must produce unjustified damage, meaning that it violated an interest protected by law, like propriety rights, and it has been committed in absence of justification's cause

Some justified causes for tort are:

-self defence, imminent and unlawful attack + current danger + no reasonable alternatives + no proportion between defense and attack + reaction vs. aggressor

-state of need, current external danger to personal rights + danger coming from tirdh causes +

A further subjective element is the capability to intend, in fact if the subject is not capable to understand and will fully the consequences of his actions are not imputable to them. The person who faced the damages is still entitled to damage compensations, which doesn't come from the tort visor her/himself if the incapacity is not of natural causes (like minors or people with mental diseases), but from their tutors or in case of artificial incapacity (and they must prove that during the act there was this incapacity).

Art 2043: explains how there is compensation for unlawful **acts** coming which is of fraudulent, malicious or negligent nature and that causes an unjustified injury to others.

There are some cases, provided by law, that indicate cases from which liability prescinds from fault, and so there is no-fault liability: -liability of the employers and principals

-harm caused by objects under custody

-harm caused by animals

-damage caused by circulation of vehicles

-harm caused by estate's collapse

There are some cases provided by law, in which a fault is presumed to be upon a person, unless she or he proves to have adopted all the measures that could have avoided the damage, which require more than standard diligence: -exercise of dangerous activities

-vehicle's driver

-parents and tutors for the harm caused by the persons supervised

The nature of damage: -patrimonial, in regards to propriety

-non patrimonial, which comes from the violation of personal rights (protected by the Constitution): the damage is evaluated in a subjective manner by the judge, as there is not an economic value

The legal effects produced by a contract are called obligations. In our legal system, there is little influence of private law in private relations; that is not the same for other states, such as religious ones or dictatorships, where the private relations are the most controlled and limited.

But what about families? There is a branch of private law dedicated to them, and they're seen for sure as private relations. This is because families are a fundamental entity of the society. In addition to that private law is involved in this type of private relation, but they're not required to enter a contract and for that reason they're an exception.

Examples:

1.hotel and guests
2.company that produces tissues and supplier that produces paper
3.company using a machinery that is intellectual propriety of a person
4.land owner and construction company
5.gruop of fiends going to the seaside

The 3rd case shows a particular kind of contract, which involves an intellectual product that has been licenced and applies an intellectual propriety contract. In this case the user of the machine must pay royalty for the use of the creation.

We also considered that one fundamental characteristic of the contract is that there must be the will of all parties in entering it, and so face all the consequences of an obligation. What happens when there is no consent or will to enter then?

Tort/wrongfull act: is a type of contract that implies obligations but that does not come from will, in fact it comes from negligence or involuntarily. In this case the party that was damaged by the negligence or the non-voluntarily of the other party is entitled to compensation for the damages.

Observing the 3rd case again: what if the company uses intellectual propriety without paying for royalty? In this case there is a tort, for which the company will not be required to pay royalty but rather damages. That is the case of a non contractual obligation that has as subject the payment of damage.

Example: a company that disposes of chemicals in a wrong way and that damages the environment by doing so, has an obligation to pay for the damages.

Types of responsibilities

the main sources of obligations are:

-contract, act of will that produce legal effects (binding relation)
-tort, comes from negligence or involuntary actions, the parties do not want to enter the obligation but find themselves into it
-particular circumstances and any other fact

what happens if one party does not perform the obligation? The debtor is liable for the negative consequences that effect the creditor and as a result they must perform the obligation and then pay a compensation (also used for tort cases) too.

Obligations can be in other words distinguished based on the source of the contract:

-non-contractual responsibility (tort), comes from cases of a party damaging another party's propriety and its peculiarity is that they did not a have a prior relation.

Example: child breaking the propriety of others at school. The parties involved are the child himself, the teacher and the damaged person. The two main subjects never entered a previous relation, and so it can be classified as non-contractual responsibility.

-contractual liability, coming from a contractual relation and from a breach of the obligations, that can be of any source and not only of contractual type.