LAW AND MORALS IN THE APPLICATION OF THE PUBLIC POLICY EXCEPTION UNDER THE TWIN REGULATIONS 1103 AND 1104 OF 2016

DERECHO Y MORAL EN LA APLICACIÓN DE LA EXCEPCIÓN DE ORDEN PÚBLICO EN VIRTUD DE LOS REGLAMENTOS 2016/1103 Y 2016/1104

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ABSTRACT: This paper discusses the interactions between fundamental principles of domestic legal systems and non-legal standards in the application of the public policy Generalklausel within the context of the twin Regulations 1103 and 1104 of 2016. In particular, this paper argues that public policy is composed of legal principles only and that there is no space for extra legal standards when the circulation of foreign deeds, decisions and laws is in discussion. This consideration has two consequences. Firstly, the role of good morals within contemporary private international law is extremely reduced. Secondly, there is no space for the direct application of soft-law standards when public policy is at stake.

KEY WORDS: Morals; Public Policy; Generalklauseln; Overriding Mandatory Rules; Good Morals; Soft Law.

RESUMEN: *En este trabajo se analizan las interacciones entre los principios fundamentales de los sistemas jurídicos nacionales y las normas no jurídicas en la aplicación del orden público Generalklausel en el contexto de los Reglamentos 2016/1103 y 2016/1104. En particular, este trabajo sostiene que el orden público se compone únicamente de principios jurídicos y que no hay espacio para normas extrajurídicas cuando se discute la circulación de escrituras, decisiones y leyes extranjeras. Esta consideración tiene dos consecuencias. En primer lugar, el papel de las buenas costumbres dentro del Derecho internacional privado contemporáneo es extremadamente reducido. En segundo lugar, no hay espacio para la aplicación directa de normas de soft-law cuando está en juego el orden público.*

PALABRAS CLAVE: *Derecho; Moral; Orden público; Generalklauseln; Anulación de las reglas obligatorias; Buena fe; Soft Law.*

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I. THE ROLE OF PUBLIC POLICY WITHIN THE TWIN REGULATIONS 1103 AND 1104 OF 2016 AND THE ISSUE CONCERNING TH APPLICABILITY OF NON LEGAL STANDARDS AS PART OF THIS *GENERALKLAUSEL*.

The twins EU Regulations 1103 and 1104 of 24 June 2016 (in force since 29 January 2019) – implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of (*i*) matrimonial property regimes and (*ii*) registered partnerships (respectively) – constitute an important step within the process of uniformization of family law matters in the context of the European Union's private international law[1]. However, this process shall necessarily *take its time* because, in order to ensure that the harmony between EU legal system in family matters is gradually reached without sacrificing the domestic identities[2], it is first of all necessary to wait for more *cultural* homogeneity in family matters between EU Member States. Uniformity is important, but not at all costs; and, as we will see, Regulations 1103 and 1104 of 2016[3] seem to be a good point of balance in the tension between uniformity and protection of domestic traditions.

The EU legislator, in light of the socially and culturally fragmented scenario concerning family law, has never had the intention of providing a complete

1 This is the necessary completion of the trend started with the already mentioned Regulation 2201 of 2003, as well as Regulations 4 of 2009 (on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations), 1259 of 2010 (so called "Rome III Regulation", implementing enhanced cooperation in the area of the law applicable to divorce and legal separation) and 650 of 2012 (on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession).

2 On this subject, see, more generally Perlingieri, P.: "Il rispetto dell'identità nazionale nel sistema italo europeo", *Foro. Nap.*, 2014, p. 449 ff.

3 Please note that, unless in the exceptional cases where there is a significant difference between the Regulations, we will only refer to the provisions of Regulation 1103 (which find also equal place, *mutatis mutandis*, in regulation 1104).

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primary law system for EU family law. Instead, it is trying to achieve the objective of harmonization in Europe through private international law (i.e. providing for uniform criteria for jurisdiction, applicable law and circulation of judgments). Should the circumstances allow to do so, and only in a second moment, the EU legislator will perhaps try to issue an embryonic form of EU primary legislation in matters of family[4].

Among the rationales inspiring the twins Regulations 1103 and 1104[5], uniformity and legal certainty surely play essential roles.

Uniformity is expressed, first of all, by the ideas of universal application and unity of applicable law[6], which respectively set forth that (*i*) "the law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State" (art. 20); and (*ii*) "[t]he law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located" (Art. 21, which applies save as for the application of the *lex rei sitae* to real estates). Secondly, uniformity is ensured by the autonomous definition[7] that the EU legislator has given of "matrimonial property regime"[8], which, according to article 3 of the Regulation 1103, means "a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution"[9]. Uniformity, however, as already stressed above, should not be pursued at any cost. The Regulations do not even try to offer a single definition of the concepts of marriage (which continue to be defined and regulated, sometimes very differently,

4 Ricci, C.: *Giurisdizione in materia di regimi patrimoniali tra coniugi nello spazio giudiziario europeo*, Padova, 2020, p. 32.

5 For a general analysis concerning the Regulations see Damascelli, D.: "Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law", *Trusts*, 2018, p. 1 ff.

6 See Viarengo, I.: "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", *Riv. dir. int. priv. e proc.*, 2018, p. 44 ff.

7 This is a general tendency of EU law. See Las Casas, A.: "La nozione autonoma di «regime patrimoniale tra coniug» del regolamento UE 2016/1103 e i modelli nazionali", *Nuove Leggi Civili Commentate*, 2019, p. 1538 ff. According to CJEU, judgment of 6 October 1982, Case C-283/81, *Srl CILFIT e Lanificio di Gavardo SpA v. Ministero della Sanità*, para. 19, Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Therefore (para. 20) "every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".

8 Or, in Regulation 1104, of "property consequences of registered partnerships".

9 Similarly, art. 3 of Regulation 1104 states that "'property consequences of a registered partnership' means the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution". This definition derived from the decision of the CJEU, 27 March 1979, *Jacques de Cavel v. Louise de Cavel*, Case C-143/78, para. 7. In this regard, Las Casas, A.: "La nozione autonoma", cit., p. 1540, correctly noted that the notion of "patrimonial regime" is extended to the regulation also to relationships with third parties, thus creating a notion which is broader than its usual meaning.

by domestic systems of law)[10] and give adequate relevance to imperative norms of domestic systems, either expressed by principles (public policy) or more specific rules (overriding mandatory rules).

Strictly related is the need for *legal certainty*, which inspires the entire EU system of private international law: a party should be able to know in advance where it may start legal proceedings, which law will be applied and under what conditions a judgment may be recognized. In matters of applicable law, this is clearly expressed by Recital 43 of the Regulations, according to which "[i]n order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable spouses to know in advance which law will apply to their matrimonial property regime. Harmonised conflict-of-law rules should therefore be introduced in order to avoid contradictory results". With regard to the enforcement of foreign judgments concerning matrimonial relationships, legal certainty requires that, in general, these judgments are enforced throughout the legal systems participating to the enhanced cooperation and, in predetermined exceptional cases, such a circulation of judgments may be limited.

Relatedly, Member States which have taken part in this enhanced cooperation have been inspired by a *favor* for the circulation of judgments which enforce patrimonial regimes arising from marriages or registered partnerships[11]. In this regard, it is significant that the Regulations contain a rule, namely art. 9, which has been enacted with the precise purpose of avoiding the circulation of decisions denying the recognition of patrimonial regimes arising from marriages or registered partnership. Indeed, according to this rule, if a court of the Member State that has jurisdiction pursuant to the Regulations "holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction". This provision clearly expresses the idea that is better to decline jurisdiction than to have a judgment against the recognition of patrimonial relationships between spouses or members

10 Similarly, Art. 3 of Regulation 1104, concerning registered partnerships, states that "'registered partnership' means the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation". At closer look, this is not a substantive definition of registered partnership and the provision merely identify the formal requirement of registration. On the coordination of this definition with the one provided by the Italian law n. 76 of 2016 (so-called "Cirinnà law") see Ricci, C.: *Giurisdizione*, cit., p. 72 ff.

11 This favor is expressed by the limited number of causes which may justify non-recognition according to the Regulations. Indeed, according to article 37, "[a] decision shall not be recognised: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought; (b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so; (c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought; (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought".

of a registered partnership, considering that, as a matter of principle, that judgment should circulate throughout Europe.

In light of these guiding principles – moving between European uniformity and the safeguard of domestic fundamental principles – it will be possible to understand why the Regulations give also relevance to domestic imperative norms in the private international law system concerning patrimonial regimes in the EU even if, as all EU private international law regulations, they try to limitate at most the recourse to these "safety valves". In this regard, Article 31 (titled "Public policy [*ordre public*]") provides that "[t]he application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum", while article 30 (titled "Overriding mandatory provisions") states that "1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum". The reference respectively applies to those fundamental principles and rules which are considered so important as to require their application without exception also to transnational cases.

The two provisions find some clarification in Recitals 53 and 54, which affirm that both public policy and mandatory rules shall be applied in "exceptional circumstances" and on the basis of "considerations of public interest". In this regard, while it is today acknowledged that public policy is a *Generalklausel* composed by the fundamental principles of a State which are considered so essential as to require application in all cases (including those with a foreign element)[12] where the concrete application of foreign law generates a result which is incompatible with such principles, overriding mandatory rules ("*lois de police*" or "*norme di applicazione necessaria*")[13] are those domestic rules which claim to be applied in any case and regardless of the functioning of private international law rules[14].

Considerations of public interest are central in the definition of public policy contained in Regulations 1103 and 1104. These considerations allow the application of national fundamental principles of the forum to a case concerning the transnational regulation of patrimonial regimes between couples and could lead to the non-application of foreign law and to the non-recognition of foreign judgments (in accordance with article 37). This is an essential safeguard which, again, mediates between the needs to allow the international circulation of values

12 This is the reason why we usually talk about "international public policy". See Perlingieri, G. and Zarra, G.: *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, p. 48 ff.

13 Bonomi, A.: "Le norme di applicazione necessaria nel regolamento «Roma I»", in Boschiero, N. (ed.): *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Torino, 2009, pp. 173-189.

14 See, *inter alia*, Francescakis, P.: "Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflits de lois", *Revue critique de droit international privé*, 1966, pp. 1-18.

and that of safeguarding national identities. However, as the case law reveals, it is not easy to understand what menaning to give to the concept of public interest.

In *Renusagar Power Co Ltd v. General Electric Co*[15] a distinguished arbitral Tribunal noted that [p]ublic policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what is injurious or harmful to the public good or public interest has varied from time to time.

As to the ascertainment of which considerations of public interest may justify the recourse to public policy, the Regulations offer to us limited guidance. However, article 38 of the Regulations, titled "Fundamental Rights", provides that "[a]rticle 37 of this Regulation [providing for the grounds for non recognition of foreign judgments] shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles recognised in the Charter, in particular in Article 21 thereof on the principle of non-discrimination". This is a significant provision from two perspectives. First of all, it clarifies – even if it was pleonastic – that the EU Charter of Fundamental Rights constitutes an example of EU public policy, i.e. the general principles which represent the real core of the legal system of the EU and that shall be applied by domestic judges jointly with the international public policy of their countries[16]. Secondly, the provision officially recognizes the relevance of human rights within the context of private international law[17], and, from this angle, this can both mean that a foreign decision violating fundamental human rights (protected by domestic and EU law) shall not be recognized and that the respect for human rights may dictate the recognition of a certain decision in a specific case. However, no other clarifications to the concept of public interest are offered by the Regulations.

Given these premises, this article will try to understand a crucial issue concerning the application of public policy (and the concept of public interest), i.e. whether this *Generalklausel* may be filled in with the relevant legal principles *only*, or also with moral considerations, as the reading of many definition of the concept seems to assume. This is a primary question when dealing with matters concerning family law, considering that this area of the law, more than others, is affected by the cultural differences in the various national legal orders. Indeed, decisions rapplying public policy in private international law, mainly coming from the common law world, very often relate this concept to non-legal values. Indeed, according to the Supreme Court of Texas, Texas Courts will not enforce a foreign law that violates

15 [1995] XX Yearbook on Commercial Arbitration 681, para. 24.

16 See Feraci, O.: *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012, *passim*.

17 See, *ex multis*, Kinsch, P.: "Droits de l'homme, droit fondamentaux et droit international privé", *Recueil des cours*, vol. 195, p. 1 ff.

good morals, natural justice or is prejudicial to the general interests of our own citizens[18].

Even more confusingly, in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Company*[19] the High Court of London stated that in order to evaluate a foreign decision as violating peremptory norms of the *lex fori* [i]t has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.

These definitions do not help in understanding whether "the public interest" has to be identified with the general principles of the legal system or with some other non-legal parameters, identified in murky concepts such as "good morals" and "natural justice"[20]. In the following lines, we will try to argue in favour of the former interpretation.

II. THE ROLE OF MORALS IN THE JUDICIAL APPLICATION OF PUBLIC POLICY.

This Section is aimed at understanding the role of morals in the application of public policy by domestic judges. In this regard, it is to be noted that very often, in the evaluation of what composes the public policy *Generalklausel*, interpreters may risk making application of their own conception of morality[21].

Moral "lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark"[22]. In this regard, it is worth pointing out that by referring to "morals" in this context we also mean social, political and religious considerations which may affect the application of the law. It is quite obvious to assume that all the legal principles and rules that are perceived so important as to be considered "imperative" have – to a different extent – a moral foundation. What has to be

18 *Gutierrez v. Collins* [1979] 583 SW 2d 312, 321.

19 [1987] 2 Lloyd's Rep 246, 254.

20 Similarly, another US Court discussed of public policy as the sum of the "forum state's most basic notions of morality and justice", without even referring to the fundamental principles of the legal system. See US Court of Appeals, Second Circuit, *Parsons & Whitemore Overseas Co. Inc v. Société Générale de l'Industrie du Papier RAKTA and Bank of America* [1974], 508 F. 2d 969.

21 See also Corthaut, T.: *EU Ordre Public*, Aalpen aan den Rijn, 2012, p. 21.

22 This conception of morality, which focuses on the realization of the common good, is named by Fuller, L.: *The Morality of Law* (Revised Edition), London, 1969, pp. 5-6, as "the morality of duty" and it is the conception of morality to which we will refer for the purpose of this book, because it is aimed at ensuring the correct regulation of private relationships within an ordered society.

clarified is whether, when and how the *application* of peremptory principles or rules allows an adjudicator to make reference to *her/his* idea of what is moral[23].

As imaginable, solutions might be different depending on the kind of legal system under examination. Civil law systems are based on rigid constitutions that are assumed to enshrine the basic axiological, moral foundations upon which the legal system is grounded. As a matter of principle, therefore, there should be no place for moral evaluations in the application of the law[24]. Contrariwise, common law systems (both having a written constitution, like the US, and not, as the UK) are traditionally based on judge-made law, which, by definition, involves a greater level of discretion by adjudicators and, therefore, allows them to make reference to basic notions of morality and justice.

More in detail, as to civil law systems, it is worth noting that the legal relevance of any fact of life is related to ethical and social evaluations, but is grounded on an *ad hoc* criterion of evaluation, i.e. the founding principles of the legal system, which represent, among the values which inspire the society, those which have been considered by decision-makers so important as to require, *through legalization*, the guarantee of their realization[25] (emphasis added).

As a consequence, it is possible to say that morality is duly taken into account when a society agrees upon the values that have to inspire the legal principles at the basis of its legal system. Afterwards, it will be for these legal principles to guide adjudicators in their decisions. Fundamental principles of the legal system generate a so-called "positive morality" or "*Rechtsmoral*"[26], which shall drive judges in their work. Hence, we are excluding that morals as such drive adjudicators' work, but we are accepting that *positivized* morals affect the decision-making process. The idea according to which the identification of the founding principles of a state (and the choice of the moral conceptions to employ in the law) can find confirmation also in the use of the word "policy" instead of "order" in the current English (and mainly US) understanding of the concept of *ordre public*. The use of the word "policy" impliedly tells us that fundamental principles aimed at filling in the empty box of *ordre public* are a matter of political choices to be carried out by legislators.

23 Subjective/personal conceptions of morality are, according to Fuller, L.: *The Morality*, cit., p. 5 f., part of "the morality of aspiration", which is the one which dictates behaviors which tend to inspire people to the reach excellence and to get the full realization of their capacities. Obviously, the morality of aspiration varies in accordance with the beliefs of each person. It is not relevant, as we will see, in the application of the law.

24 Viola, F.: "La teoria della separazione tra diritto e morale", in AA.VV.: *Studi in memoria di Giovanni Tarello, Giuffrè,* Milano, 1990, p 673 ff.; Barberis, M.: "Diritto e morale: la discussione odierna", *Journal for Constitutional Theory and Philosophy of Law,* 2011, p. 56 f.

25 Falzea, A.: "Complessità giuridica", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, Napoli, 2011, p. 5 (own translation).

26 Pastore, B.: "Dworkin giusnaturalista?", *Rivista internazionale di filosofia del diritto*, 1984, p. 80; Perlingieri, G.: "La via alternativa alle teorie del «diritto naturale» e del «positivismo giuridico inclusivo» ed «esclusivo». Leggendo Wil J. Waluchow", *Annali SISDIC*, 2020, p. 73 ff.

Hence, in the identification of imperative norms (including principles composing public policy), judges shall always refer to those choices (as expressed by the legal system).

As Gerald Goldstein puts it [l]'emploi du mot *policy*, et non *order*, implique bien cette idée de considération de *politique* gouvernementale, qui se retrouvera au cœur des conceptions américaines modernes. Ceci explique la [moderne] tendance très nette des juges anglais de restreindre leur usage de la notion en invoquant la séparation des pouvoirs; c'est le législateur, en principe, et non le juge, qui a le pouvoir de déterminer les grandes orientations politiques et ce qui constitue leur violation[27] (emphasis in original).

From this angle, the norms expressing the fundamental values and moral foundations upon which a state is grounded are to be considered as imperative[28]. In the words of an authoritative scholar: [l]egal systems are inspired by a certain philosophy, *which lets us evaluate certain behaviours as permissible or impermissible on the basis of cultural values inherent to the legal system*, and which inspires the understanding of the technical choices made by legislators[29] (emphasis added).

We know that the way in which legal principles are to be applied depends on the circumstances of the concrete case[30]: judges make, in all their decisions, an evaluation of which value (encapsulated in a legal principle or rule) has to prevail, by way of balancing the interests and values which may be potentially applied to the dispute[31]. This generates a circular process in which the sensibility of judges comes significantly into play as a decisive factor in unravelling the complexity of concrete cases through the process of balancing. Hence, morals come before the law, but also exercise a certain influence when the law has to be interpreted and applied[32]. Imperative principles composing public policy, whose application depends on interpretation, are not extraneous to this process.

27 Goldstein, G.: *De l'exception d'ordre public aux règles d'application necessaire*, Montreal, 1996, p. 153.

28 This, however, implies that decision-makers can expressly provide – within the law – that certain decisions are to be based on (or related to) moral evaluations. The reference applies, e.g., to the rare cases in which the law refers to "good morals", a concept which seems to imply (*infra* Section 2.3) social, ethical and moral evaluations by judges. Bianca, C.M.: "Riflessioni di un civilista sul diritto naturale", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, cit., p. 40.

29 Perlingieri, P.: "La «grande dicotomia» diritto positivo - diritto naturale, in Oltre il «positivismo giuridico»", in Sirena, P. (ed.): *Oltre il "positivismo giuridico" in onore di Angelo Falzea*, cit., p. 91 (own translation). See also Bianca, C.M.: "Riflessioni di un civilista", cit., p. 42 and Criscuolo, F.: "Constitutional Axiology and Party Autonomy", *The Italian Law Journal*, 2017, p. 372, affirming that "within a democratic State governed by the rule of law, featuring a hierarchy of sources with a rigid Constitution at its top, it may never be stated that there is no shared essential project of justice as an expression of constituent values and not merely of moral imperatives".

30 Scaccia, G.: "Constitutional Values and Judge-Made Law", *The Italian Law Journal*, 2017, p. 178.

31 This is called as "reasonableness-style" legal reasoning and is probably the most applied style of legal reasoning today. See, in general terms, Perlingieri, G.: *Profili applicativi della ragionevolezza nel diritto civile,* Napoli, 2015, *passim*.

32 Pino, G.: "Diritto e morale", in Bongiovanni, G. (ed.): *Che cos'è il diritto. Ontologia e concezioni del giuridico*, Torino, 2016, p. 18.

The situation is not very different in common law, but, as to these systems of law, it is necessary to account for a longer tradition in which law and morals have been significantly intertwined. Indeed, with reference to the common law as developed in the UK, adjudicators' decisions were pervaded by their idea of morality, possibly the one which best represented the societal sentiment[33]. Indeed, as it has been authoritatively said, [t]he judge, according to the classical common law conception, expresses the essence of the community's moral experience, distilling it in the form of 'wise' decisions. (…) The wise decision would be the one that would satisfy the popular sense of justice of the community, and would be capable of being understood as rational, principled and constituent in the light of prior decisions and predictable future cases[34].

In light of the above, it can be said that in common law the adjudicators' task was that of creating legal principles out of diverse social and moral experiences[35]. Imperative norms were therefore directly grounded on the judges' conception of morality.

The situation has, however, evolved. Common law systems today have started developing the practice of enacting statutes, at least in certain crucial areas of the law. As a consequence, judicial activity has today become closer to the one of civil law judges, mainly consisting in statutory interpretation[36]. Moreover, the crystallization of precedents has generated – notwithstanding the obvious possibility of overrulings[37] – a *corpus* of principles and rules applicable to certain categories of cases that might be compared to written laws. Hence, like in civil law systems, positive law (either enacted by legislators or created through precedents) provides the "rules of the game" which establish the ways in which morality can enter into the law[38].

Indeed, as stated by the Supreme Court of Michigan, [p]ublic policy of a State is fixed by its Constitution, its statutory law, and decisions of its courts, and when

33 See Ferri, G.B.: *Ordine pubblico, buon costume* e *la teoria del contratto*, Milano, 1970, p. 92: "In presence of precise legal commands, moral evaluations become superfluous: what is important is the legal evaluation, that prevails and cannot be modified on the basis of moral conceptions" (own translation). This means that, if legal evaluations are lacking, moral ones find again place in judges' reasoning.

34 Cotterell, R.: "Common Law Approaches to the Relationship between Law and Morality", *Ethical Theory and Moral Practice*, 2000, p. 11. The strict link between law and morals also finds confirmation in an analysis of the role of juries, which had the obligation to issue "a verdict according to conscience".

35 Cotterell, R.: "Common Law", cit., p. 13.

36 Cotterell, R.: "Common Law", cit., p. 14.

37 Palombino, F.M.: *Fair and Equitable Treatment and the Fabric of General Principles*, The Hague – Heidelberg 2018, p. 144 ff.

38 Bobbio, N.: *The Future of Democracy: A Defence of the Rules of the Game*, Minneapolis, 1987, p. 156. According to Cotterell, R.: "Common Law", cit., p. 18, it is necessary to recognize that "law cannot realistically be regarded today as relating to a single morally unified community. Rather, it relates to different kinds of moral community reflecting different types of social relationship that bind people together".

the Legislature enacts a law (…) enactment is so far as it bears upon matter of public policy is conclusive (…). Public policy is but the manifest will of the State[39].

Then, the diverse values at stake in every case (expressed through fundamental principles of law) are to be balanced by adjudicators on the basis of an analysis of the circumstances of concrete cases and taking into account all the relevant competing principles and interests[40]. Therefore, in common law too, imperativeness is today grounded in positive law. However, it does not mean that morality does not play any role anymore: as in civil law tradition, to the extent that it is meant as positive morality, it does play a crucial role, when judges have to interpret the law and to balance imperative principles and rules[41].

III. THE INTERPLAY BETWEEN PUBIC POLICY AND GOOD MORALS.

From the above, it might be easier to infer how *ordre public* interacts with good morals (the French *bonnes moeurs*, and Italian *buon costume*), *i.e.* the societal conception of decency. This is, for the inextricable links existing between the law and non-legal traditions affecting this area of the law, another extremely important issue with regard to the functioning of public policy in family law matters.

According to Domat (whose thinking was based on Papinianus' writings)[42], when something is against good morals "it is a harm to human virtues, it offends people's honor and decency'"[43]. Historically, this is not a concept of *strictum ius*, but rather recalls some ethical, religious and somehow subjective evaluations of decency[44]. Good morals, according to the traditional view, seem to introduce a

39 Michigan Supreme Court, *Lieberthal v. Glens Fall Indemnity* [1946], 316 Mich 37; 24 NW 2d 547.

40 Currie, B.: "Married Women's Contracts: A Study in Conflict-of-Laws Method", *University of Chicago Law Review*, 1958, *passim*. See also Pound, R.: "Law and Morals – Jurisprudence and Ethics", *North Carolina Law Review*, 1945, p. 188.

41 It is, therefore, possible to try to arrange some general conclusions concerning the ways in which values penetrate in adjudicators' legal reasoning and influence the determination of which norms have to be considered as imperative. Following the approach of the distinguished US scholar Michael S. Moore, it is arguable that morality enters into judges' reasoning in four ways: (*i*) when the latter expressly refers to the former as a parameter for evaluating conducts (e.g. when the law refers to "good morals", "moral turpitude" etc.); (*ii*) as a matter of argumentation, judges may make recourse (also) to values in order to justify the (legal) solution they reach; (*iii*) in interpreting the law adjudicators duly take into account the values which are at the basis of the legal system; and (*iv*) in the cases where the application of the obvious law conducts to wrong, unjust or otherwise immoral results, judges may make recourse to the morality emerging from fundamental principles of the system in order to avoid to reach such results. In this regard, it is important to clarify that, while *sub* (*i*) the reference applies to the moral conception of the judge of what is right or wrong, *sub* (*ii*), (*iii*) and (*iv*) we always refer to the one we have called the "positive morality", i.e. the morality which is encapsulated in the rules and principles that are going to be applied. See Moore, M.S.: "Four Reflections on Law and Morality", *William and Mary Law Review*, 2007, p. 1527 ff.

42 Digesto 28, 7, 15. More generally, contracts with immoral consideration (*negotia ob turpem causam*) were forbidden in Roman law. See Gigliotti, F.: *Prestazione contraria al buon costume,* Milano, 2015, p. 13 ff.

43 Domat, J.: *Le leggi civili disposte nel loro naturale ordine*, VIII, Pavia (translation of the French edition of 1776) 1831, p. 348.

44 Trabucchi, A.: "Buon costume", in *Enciclopedia del diritto (online)*, Milano, 1959, p. 1; Carresi, F.: "Il negozio illecito per contrarietà al buon costume", *Rivista trimestrale di diritto e procedura civile*, 1949, p. 34.

form of imperativeness deriving from societal conscience[45] *to be added* to the imperativeness deriving from the law, which is encapsulated in the two notions of public policy and mandatory rules. If one accepts this approach (something which will be denied), when good morals are rendered applicable by the law, adjudicators would face to parameters of imperativeness to be applied in parallel: the legal one (public policy) and the one deriving from her/his conception of decency (good morals).

The analysis of the interaction between public policy and good morals is not a proof of concept, but an actual necessity dictated by the fact that traditionally the two categories have been referred to by domestic systems of law, in order to determine the nullity of domestic contracts and/or the impossibility to apply foreign law. In civil law countries, the law provides that contracts may be null and void either for violations of public policy or for contrariness to good morals (the two grounds are seen separately)[46]. Contrariwise, in common law systems the two notions of *ordre public* and good morals are usually jointly referred to by judges as parts of the broader public policy review[47].

In the words of Cardozo Justice, [t]he courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency and fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal[48].

Until the first half of the twentieth century, written laws very often made reference to common conceptions of morals ("public morals"), in order to allow or forbid certain behaviors to private parties. The reference to good morals (or *bonnes moeurs*) was also often made to provide judges with a tool to fill in the *lacuna*e of the legal order[49]. The reason for this continuous reference to *bonos*

45 Ferrara, F.: *Teoria del negozio illecito nel diritto civile italiano*, Milano, 1914, p. 6; Crea, C.: "La 'resilienza' del buon costume: l'itinerario francese e italiano, tra *fraternité* e *diversité*", *Rassegna di diritto civile*, 2019, p. 887.

46 It is here sufficient to mention, with regard to domestic relationships, Article 1133 of the *Code Napoleon* of 1804 (in force until 2016), as well as articles 1343 and 1418 of the Italian Civil Code, saying that a contract is null and void whenever the consideration is illegal, i.e. it is contrary to mandatory rules, *ordre public*, or good morals. It is worth noting that in Germany the situation is different, considering that § 138 of the BGB attributes to good morals (*gute Sitten*) the functions that are traditionally proper of public policy. As to private international law relationships, Article 31 of the Italian Preliminary Norms to the Italian Civil Code (in force until 1995) stated that the application of foreign law was to be forbidden when in violation of *ordre public* and *bonnes moeurs*.

47 Forde, P.B.: "The «Ordre Public» Exception and Adjudicative Jurisdiction Conventions", *The International and Comparative Law Quarterly*, 1980, p. 259; Carter, P.B.: "The Role of Public Policy in English Private International Law", *The International and Comparative Law Quarterly*, 1993, p. 6; Mansoor, Z.: "Contracts Contrary to Public Policy under English and Dutch Law", *European Journal of Comparative Law and Governance*, 2014, p. 300 ff.; Perrone, R.: *"Buon costume" e valori costituzionali condivisi. Una prospettiva della dignità umana*, Napoli, 2015, p. 185 ff.

48 Court of Appeals of New York, *Loucks v. Standard Oil Co. of New York*, [1918] 120 NE 198, 202.

49 Ferrara, F.: *Teoria del negozio*, cit., p. 4; Carresi, F.: "Il negozio illecito", cit., p. 33.

mores in legislative texts mainly lied in the fact that *ordre public* was not seen, as it is today, as a way for recalling general principles, but it usually overlapped with specific and rigid mandatory rules of the forum[50]. This means that public policy was seen as a *summa* of the imperative norms of a domestic system of law.

As we noted in the previous Section, however, the advent of modern constitutions determined that, in principle and save for certain exceptions, the only admissible ethical evaluations to be made by judges are those which are expressed by the values which are crystallized in positive law, especially in constitutions[51]. In the words of a distinguished scholar it is not possible to even imagine that the imperativeness of the law and the determination of what is permitted is referred to moral evaluations[52].

A reference to good morals would, indeed, entail the risk that the evaluation of what is decent (and therefore licit) is carried out by adjudicators on a subjective basis; and this is exactly the risk that modern legal culture was borne to avoid.

For this reason, one may recall that several scholars talk about *Rechtsmoral*[53] in order to avoid to let subjective morals come into play in the legal reasoning. Similarly, *bonnes moeurs* should today be deduced from the fundamental principles of any legal system[54]. As a consequence, good morals do not represent an autonomous legal category[55], and their content started to be merged in the concept of *ordre public*[56]. It is not by chance, indeed, that the Italian reform of private international law carried out in 1995 (by means of Law No. 218)[57] and the recent French reform of the *Code Napoleon* (2016)[58] have excluded good morals from the causes for refusing the application of foreign law and for declaring a

50 Rodotà, S.: "Ordine pubblico o buon costume?", *Giurisprudenza di merito*, 1970, p. 105; Crea, C.: "La 'resilienza'", cit., p. 888.

51 Rodotà, S.: "Ordine pubblico", cit., p. 104; Perlingieri G., "La via alternativa", cit., pp. 73 ff.

52 Trabucchi, A.: "Buon costume", cit., p. 1 (own translation).

53 See Crea, C.: "La 'resilienza'", cit., p. 890.

54 These principles (as we saw in Chapter 1) may be directly applied to private law relationships. See Caroccia, F.: *Ordine pubblico. La gestione dei conflitti culturali nel diritto privato*, Napoli, 2018, p. 163; Perlingieri, P.: "Constitutional Norms and Civil Law Relationships", *The Italian Law Journal*, 2015, p. 17 ff.

55 Blom, J.: "Public Policy in Private International Law and Its Evolution Over Time", *Netherlands International Law Review*, 2003, p. 392: "[t]he growth of constitutionally protected social and economic rights within domestic legal systems may enhance considerations of public policy, where private legal issues intersect with these constitutional norms".

56 Crea, C.: "La 'resilienza'", cit., p. 890, talks about a "philanthropic" conception of *ordre public*. This renders *bonos mores* a residual and mainly useless category. See Panza, G.: *Buon costume e buona fede*, Napoli (reprinted in 2013), 1973, p. 142.

57 Articles 16 and 17 of this law only say that foreign law can be refused if it is contrary to public policy and overriding mandatory rules respectively.

58 *Ordonnance* n. 131 of 10th February 2016. Newly enacted Article 1102, para. 2, of the new French *Code Civil* only says that party autonomy cannot derogate to public policy.

contract null and void respectively[59]. The same happened when the *Code Civil* of Quebec has been reformed[60].

With the possible exceptions of sexual morality[61] and some indecent religious practices (such as, e.g., certain voodoo rituals)[62], where ethical evaluations are still commonplace,[63] good morals now shall be located *within* the framework of positive law[64] and, except for common law countries, some post-communist states and Germany[65], the category of good morals has been completely eroded[66]. As of today, when judges evaluate the compatibility of private actions with *bonnes moeurs*, they are often actually carrying out a *legal* analysis that could be equally made under the umbrella of public policy. A significant example of this practice is the English case *City of Gotha v. Sotheby's*[67]. The Federal Republic of Germany, which prior to the Second World War owned a seventeenth century Dutch painting, sought to recover it, when a Panamanian company tried to sell it through auction in London, in 1989. The owner of the painting admitted that he was aware of the possibility that the painting had been subject to smuggling, but he claimed that Germany's action was time barred under German law. While refusing to apply the time bar, the Court stated that the defense was precluded, because who acquired a stolen property in bad faith cannot take advantage of the limitation period against the rightful owner. The Court highlighted the dishonest behavior of the defendant and affirmed that this "lent a fundamental moral character to the issues that faced the Court"[68]. Unsurprisingly, the defense was considered against public policy. Actually, the adjudicator applied – even if without mentioning it –

59 Guarneri, A.: "La scomparsa delle bonnes moeurs dal diritto contrattuale francese", *La nuova giurisprudenza civile commentata*, 2017, p. 404 ff.

60 Terlizzi, G.: *Dal buon costume alla dignità della persona*, Napoli, 2013, p. 103 ff.

61 In this regard, it is sufficient to think about prostitution (in the legal systems where it is forbidden). While in principle a sexual performance could be considered as a form of job to be remunerated, the payment of a sum of money for this kind of activity is considered to be *contra bonos mores* and therefore illegal. See, in this sense, Italian Supreme Administrative Court, Decision of 22 October 2008, No. 5178. On this matter see Carusi, D.: *Contratto illecito e soluti retentio,* Napoli, 1995, p. 20 f., saying that sexual performances "belong to an area of protection of fundamental rights of individuals that cannot be subject to a market logic" (even if, when prostitution is forbidden, it could be replied that jointly with the moral disappointment there is always a legal ban which, again, could render the category of *bonos mores* useless). See also Panza, G.: *Buon costume*, cit., p. 100.

62 Pacillo, V.: *Buon costume e libertà religiosa*, Milano, 2012, p. 149 ff.; Perrone, R.: *Buon costume*, cit., p. 285 ff.; and, with specific regard to Muslim practices, Mancini, L.: *Immigrazione musulmana e cultura giuridica*, Milano, 1998.

63 Reference to "public morals" also took place in the ECHR context as a legal basis for limiting the enjoyment of conventional rights. This understanding of the concept of good morals is not the subject of the present book; see Perrone, R.: *Buon costume*, cit., p. 155 ff.

64 Lonardo, L.: *Ordine pubblico e illiceità del contratto*, Napoli, 1993, p. 268 ff. For a contrary approach see Gazzoni, 2006, pp. 803 ff. On the primacy of constitutional principles see also Salerno, F.: "La costituzionalizzazione dell'ordine pubblico internazionale", *Rivista di diritto internazionale privato e processuale*, 2018.

65 In this Country *ordre public* is completely encompassed in the *gute Sitten*.

66 Guarneri, A.: "La scomparsa", cit., p. 405.

67 *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.*, [1998] QBD (unreported but mentioned in Blom, J.: "Public Policy", cit., p. 390).

68 Blom, J.: "Public Policy", cit., p. 390.

the notorious principle "e*x iniuria jus non oritur*", according to which nobody can take advantage of its illegal conduct. The issue was, therefore, purely legal and the moral character that the judge gave to it was actually absorbed in the application of the mentioned principle.

In light of the above, we can state that, generally speaking, both domestic and international public policy involve an analysis of the possible violation of *Rechtsmoral* and, consequently, the concept of good morals in private international law nowadays is superfluous[69]. *Ordre public*, being a *Generalklausel* to be filled in with the relevant fundamental principles, is able to fulfill the function of "window on the outside world"[70], without the necessity to recur to the category of *bonnes moeurs*[71], which originally carried out this task.

However, some authors affirm that the concept of good morals is currently to be interpreted as a reference to human dignity and, for this reason, they still consider *bonnes moeurs* as a useful legal category[72]. Hence, a contract violating human dignity (e.g. providing for slavery) would be null for violation of good morals. It is possible to reply to these authors that human dignity, as encapsulated in constitutions (e.g. Article 2 of the Italian Constitution and Article 2 of the 1999 Bolivarian Constituion of Venezuela, affirming the preeminence of human rights) or in international charters on human rights, is today a legal value to be related to the human rights protected by the law. For this reason, it is not necessary to revive the concept of good morals in relation to the safeguard of human dignity, in particular to the extent that human dignity is protected through the prism of public policy.

In conclusion, we can affirm that the only source of public policy stays in the fundamental principles of the positive legal system. representing the *Rechtsmoral.*[73] For the sake of this analysis, therefore, we will not refer to the concept of good morals henceforth.

69 More generally, for this opinion see Badiali, G.: *Ordine pubblico e diritto straniero*, Milano, 1963, p. 90 ff.; Rodotà, S.: "Ordine pubblico", cit., p. 107; Carusi, D.: *Contratto illecito,* cit., p. 32 ff.; Caroccia, F.: *Ordine pubblico.*, cit., p. 167.

70 This locution is from Crea, C.: "La «resilienza»", cit., p. 875.

71 For a contrary opinion see Crea, C.: "La «resilienza»", cit., p. 892 ff, talking about a "resiliency" of *bonos mores*.

72 Oddi, A.: *"La riesumazione dei boni mores"*, *Giurisprudenza costituzionale*, 2000, p. 2247; Terlizzi, G.: *Dal buon costume,* cit., p. 99. For a confusion between morality and universally protected human rights see also Verheul, H.: "Public Policy and Relativity", *Netherlands International Law Review*, 1979, p. 112.

73 This was originally envisaged by Rescigno, P.: "In pari causa turpitudinis", *Rivista di diritto civile*, 1965, *passim*. See also Patti, F.P.: "In pari causa turpitudinis", cinquant'anni dopo, in AA.VV.: *Liber amicorum Pietro Rescigno*, Napoli, 2018.

IV. THE ROLE OF SOFT-LAW IN DETERMINING THE CONTENT OF PUBLIC POLICY.

Having clarified that the moral conceptions of individuals do not contribute to the content of the public policy *Generalklausel*, for the sake of completeness, it is now necessary to spend some lines on whether and how a widely discussed (alleged) source of the law, namely soft law, may contribute to the content of public policy and, if so, what is the relationship of soft-law sources with domestic fundamental principles. Preliminarily, it must be noted that the definition "soft law", traditionally attributed to Lord McNair, is used to describe instruments with extra-legal binding effect.

In this regard, it has been explained that extralegal norms can serve as a compromise between sovereignty and the need to establish rules to govern international relations. Such rules represent social norms where the expectation of compliance is of lesser significance. If a State violates such soft law norms, condemnation will be less swift and severe than when it violates a legal norm.[74] (…) It is not easy to define soft law in a precise sense. It does not represent a legal concept with a clearly determinable scope and content. It is more of a catchword, symbolizing a specific form of social rules in the penumbra of international law. To put it abstractly, soft law as a phenomenon in international relations covers all those social rules generated by State[s] or other subjects of international law which are not legally binding but which are nevertheless of special legal relevance[75].

As it was correctly noted, the expression "soft law" seems to contain an oxymoron, because the law cannot, by definition, be "soft" since it is characterized by coercibility[76]. Hence, our discussion should end up here, considering that a "soft" kind of law is, again, by definition, unable of generating imperative norms (*i.e.* the hardest source of law). Soft law might produce mere social blame.

However, while some authors deemed soft law as a threat to the rule of law[77], today it is very common to see soft law norms at the basis of the reasoning conducting to judicial decisions, in particular in certain areas of public international law where a written source of law is lacking (such as the regulation of evidence and conflicts of interests in international arbitrations). Hence, some authors claimed that, in such cases, there is a very thin line between soft law and hard law.[78]

74 Thurer, D.: "Soft Law", in Wolfrum, R. (ed.): *Max Planck Encyclopedia of Public International Law*, (online edition) 2009, para. 6.

75 Thurer, D.: "Soft Law", cit., para. 9.

76 Palombino, F.M.: *Introduzione al diritto internazionale*, Bari, 2019, p. 130.

77 Klabbers, J.: "The undesirability of Soft Law", *Nordic Journal of International Law*, 1998, p. 381.

78 Kaufmann-Kohler, G.: "Soft Law in International Arbitration: Codification and Normativity", *Journal of International Dispute Settlement*, 2010; Palombino, F.M.: *Introduzione*, cit., p. 131.

This phenomenon takes place mainly in cases where the soft law source comes from a very distinguished author, such as the International Law Commission or the General Assembly of the United Nations. As an example, it is possible to mention the Resolution 64/292 of 28 July 2010, through which the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realization of all human rights. This is certainly a soft law instrument which, however, was applied by the investment arbitration Tribunal in *Urbaser v. Argentina*[79] as a representation of customary international law[80].

Does this mean that soft law instruments are apt to directly generate imperative principles at the domestic level? The answer seems to be in the negative, for the following reasons which directly attain to the functions of this soft law in relation to general international law.

Indeed, soft law may have three effects in its relationship with general international law, i.e. declaratory effect, crystallizing effect and generating effect[81]. The first of these effects concerns the codification in written form of an already existent general international law norm. In so far as one of these effects takes place, it is evident that there may be an indirect interference between this kind of soft law norms and domestic imperativeness, which is influenced by the existing norm of customary international law, but whose content may be ascertained recurring to the soft law instruments. The discourse is slightly different with regard to soft law instruments which help in crystallizing customary international norms whose content is still in formation and, therefore, subject to variation: here the soft law instrument – which, again, does not directly influence domestic imperative norms – may be useful for domestic judges in ascertaining the scope of application of general international law norms that have a direct influence over domestic fundamental principles. Finally, as to soft law instruments which have a catalytic effect for the creation of general international law, it is evident that – once the general international law norm eventually comes into existence – its content may be easily ascertained referring to the "generating" soft law instrument. In this case, as well as in the others, soft law influences domestic fundamental principles through the medium of general international law within a circular process which

79 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1197.

80 See also Riphagen, W.: "From Soft Law to Ius Cogens and Back", *Victoria University of Wellington Law Review*, 1987, who demonstrated that soft law may also influence the creation of international *jus cogens* norms.

81 Greco, D.: "Soft law e diritto internazionale generale", in *Rassegna di diritto pubblico europeo*, 2021 (in course of publication). We will not deal in this book with the relationship between soft-law and treaties since this issue falls outside the scope of the present analysis. For a general analysis of the phenomenon of unification of domestic systems of law through soft law see Šarčević, P., "Unification and «Soft Law»", in Stoffel, W.A. and Volken, P. (ed.): *Conflicts and Harmonization: Mèlanges en l'honneur d'Alfred E. von Overbeck à l'occasion de son 65ème anniversaire*, Fribourg, 1990.

exists between the general international law norm and the soft instruments which determine its content and scope of application.

As an example of this practice, it is possible to mention a well-known decision of the Italian Supreme Court[82] which applied Article 15 of the Universal Declaration of Human Rights (concerning the right to citizenship) as the legal basis for denying the possibility to consider as stateless certain formerly Italian citizens who went to live in Libya prior than the WWII and then lost their Libyan citizenship when the United Kingdom of Libya was constituted in 1951. Article 15 of the Universal Declaration (which, being a resolution of the General assembly, is a soft law instrument) was therefore apparently used as a direct source of imperativeness. However, scholarship, noted that a correct (and contextualized) reading of the decision reveals that the Italian Supreme Court used Article 15 to confirm already existing norms (both domestic and international) concerning the prohibition of statelessness.

In the same vein – and more explicitly – the same Italian Supreme Court used Article 19 of the Universal Declaration (on the right to information)[83] and Article 25 (on the right to housing)[84] to corroborate already existing customs directly generating rights for individuals.

In conclusion, as far as this author is concerned, while there are no judicial decisions *directly* applying soft law sources as a reason backing the refusal of either recognition of foreign judicial decisions or application of foreign law, it seems possible (and likely) that the above reasoning applies also in this context. Judges might, therefore, refer to soft law instruments in order to ascertain the content of existing general international law norms and confer them imperative value on the domestic law level in the form of national fundamental principles. This does not mean that soft law norms are *per se* binding[85]: they provide, indeed, an

82 Decision of 1st February 1962, n. 191.

83 See Italian Supreme Court (Plenary Session), decision of 17th July 2015 n. 31022.

84 Italian Supreme Court, decision of 1st July 2015, n. 27809.

85 We have therefore to deny the theses which, referring to soft forms of regulation of legal relationships, affirm that "a new legal order is emerging: it comes from below, where social systems and sub-systems demand autonomy and self-regulation. They refuse the control of national governments and develop forms of auto-constitutionalism, becoming 'the realistic candidate (…) to represent the dynamism of civil society'. (…) Globalization, with its economic, cultural, social and political transformations, has determined a new legal order that is based on a legal pluralism, where official and formal forms of law are shaped with unofficial and informal legal sources". Scamardella, F.: "Law, globalisation, governance: emerging alternative techniques", *The Journal of Legal Pluralism and Unofficial Law*, 2014, p. 2 (citing Teubner, G.: *La cultura del diritto nell'epoca della globalizzazione*, Roma, 2005, p. 73). According to Scamardella, p. 2, "new legal pluralism is the main expression of a new global governance, which is trying to replace the government model based on the national state authority". This idea is, in our opinion, misplaced and does not find any confirmation in international practice, considering that judges – both national and international, use soft law instruments cautiously and are always careful in grounding their decision on existing, formal and binding sources of law. In this regard, it is to be noted that the alleged "new legal system" based on soft forms of regulation does not have any positive foundation and, moreover, it is even difficult to identify its actors. For a general criticism to the concept of soft law (sometimes exaggerated, as confirmed by the subsequent writings of

useful tool in order to identify general international law norms which have their autonomous binding force and which are apt to influence domestic conceptions of imperativeness[86].

From the above, and in conclusion, we can infer that while judges are precluded from applying their conception of what is moral in the concrete utilization of the public policy *Generalklausel*, other non-legal standards – known as soft-law sources – may, by way of interpretation, actively contribute to the delineation of the content of *ordre public*. The determination of the content of public policy for the purpose of Regulations 1103 and 1104 of 2016 will be a complex interpretative task which, in any case, will circularly involve the circumstances of concrete cases and the relevant fundamental principles, but will only be indirectly affected by considerations which are not linked to the relevant legal system.

the same author) see also D'Aspremont, J.: "Softness in International Law: A Self-Serving Quest for New Legal Materials", *The European Journal of International Law*, 2008.

86 Another, but related, discourse concerns the capability of soft-law norms to "codify" general principles of private international law and, more generally, the effects of soft law over private international law. In this regard see Leandro, A.: "La codificazione del diritto internazionale privato fra strumenti internazionalistici e diritto dell'Unione europea", in Annoni, A., Forlati, S., and Salerno F. (ed.): *La codificazione nell'ordinamento internazionale e dell'Unione europea*, Naples, 2019, p 283 ff. The author argues that soft law instruments may constitute a significant impulse for the codification of private international law within domestic legal systems, they may systematize the emergence of trends in state practice or, in any case, they may represent the state of art of private international law on a certain subject (even on the basis of a comparative approach). As an example of this practice, it is possible to mention the Model Laws enacted by UNCITRAL with regard to private international law regulation of subjects such as cross-border insolvency. The author highlights that soft law instruments related to private international law have been used also within the context of the European Union. The reference applies, e.g., to the Commission's communication COM (2018) 89 of 12th March 2018, on the applicable law to the proprietary effects of transactions in securities. This communication was aimed at promoting clarity and predictability about which country's law applies to determine who owns the underlying assets of the transaction is of the essence. In this regard, the Commission noted that in presence of various directives regulating the subject (98/26/CE of 19th May 1998, 2002/47/CE of 6th June 2002, 2001/24/CE of 4th April 2001) as well as of the Hague Convention of 5th July 2006 on the law applicable to certain rights in respect of securities held with an intermediary (which was neither ratified by the EU nor for the Member States), it was worth issuing a communication clarifying the Commission's views on important aspects of the existing EU acquis with regard to the law applicable to proprietary effects of transactions in securities (in order to avoid, as far as possible, the interpretative uncertainties generated by this bundle of legal instruments). In this regard, it is likely that the Communication will be a point of reference for adjudicators dealing with the subject.

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