Chapter 1

THE LEGAL SYSTEM

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1. Rules and norms

These two words have something in common worth pointing out. Both words imply the repetition of facts or conduct: "rule" derives from the Latin word *Regula* or straight, and recalls something that is "regular"; "norm" refers to what is "normal". The very purpose of a rule/norm is to direct humans to adopt a certain pattern of behaviour – such as not stealing or causing wrongful harm – in order for the latter to become "normal".

What is a rule?

A rule is a statement that governs human conduct; its scope is not to narrate or implicate, but to **direct** conduct. It may stipulate that particular conduct is compulsory (imposing a duty to act), prohibited (forbidding it) or lawful (permitting it).

There are different types of *rules* that provide guidance:

a) **personal**: seeks to regulate the conduct of a specific person or group of persons (*e.g.*, "*Paul, when you get out, close the door!*");

b) **factual**: covers one or more factually specified situations (*e.g.*, "*Paul, open the door every morning at 9 o'clock*");

c) **general**: directs whoever may find themselves in a specified situation (*e.g.*, "*The last person to leave should close the door*");

d) **abstract**: covers any situation that repeats the one envisioned (*e.g.* "*At the end of each lecture, the last person to leave should close the door*").

The law encompasses all the different types of rules:

• *personal* and *factual* as, for instance, when the sentence of a court directs John, a debtor, to pay a sum of money to Joe, his creditor.

• *general* and *factual* as, for instance, an ordinance issued by a mayor after heavy snowfall directing the residents to shovel the snow off the sidewalk in front of their house. In such a case, the rule applies to whoever resides in the municipality, though it is restricted to a specific situation.

When speaking about a rule of law, legal scholars do not usually refer to rules providing specific guidance, but to **higher rules** prescribing in a **general and abstract** fashion what conduct is permissible or required in a situation that resembles that envisioned by the legal provision in question. A clear and simple example of this principle is provided by Art. 927 Italian Civil Code (**CC**), which states that *whoever finds a movable thing* shall return it to its owner.

Save for a few exceptions, rules contained in codes, statutes, decrees, and regulations are both *general* and *abstract*.

Sanctions

The effectiveness of a rule of conduct (*i.e.*, a norm-precept) is conditioned on provisions to secure its enforcement (*i.e.*, a norm-sanction). These subject the person who breaks the rule to "negative" consequences.

Sanctions come in different forms. The law makes a distinction between *civil* sanctions, such as compensation for damages inflicted on a person; *criminal* sanctions, such as imprisonment; and *administrative* sanctions, such as a fine.

2. The legal rule

The field of rules is as vast as that of human experience. In small acts as in major decisions, people adapt to or ignore rules: moral rules, local customs, rules governing particular professions, rules of courtesy, and many others.

Legal and non-legal rules

A person brought up in a given society acquires a certain capacity to distinguish the diverse "nature" of rules.

Each one of us is fully aware, for instance, that legally speaking it is compulsory for a businessman or a professional to issue a receipt or an invoice for work done or goods sold; but a person may sometimes be embarrassed to request one as they may feel, albeit mistakenly, that such a request conflicts with the *rules of courtesy*.

Similarly, most people establish a clear distinction between rules requiring military personnel to follow a specific dress code and rules that prohibit professors and students from wearing tank tops. Intuition and experience tell the average person that the first set of rules is the law and that the second set falls under a different category.

Other cases, however, may prove less clear. For example:

- is equality between husband and wife a moral principle which one may choose to uphold or is it a legal rule?
- are human rights entrenched in the laws of a State or are they only guaranteed by humanitarian principles or international law, such as an international convention?
- are collective bargaining agreements entered into by trade unions legally binding or do they constitute gentlemen's agreements?

To answer these questions, a line must be drawn between what the "law" is and what the "law" is not; it is, therefore, necessary to establish *criteria* through which legal rules can be recognized and distinguished from all other types of rules.

Arguably, the issue is different when approached from outside the legal perspective; for instance, from the anthropological or sociological viewpoint.

Courts and the law

An anthropologist trying to discover the law of a primitive society may say that "the fundamental prerequisite to the establishment of the rule of law in any society" is "the legitimate use of physical coercion by an authorized agent". Hence, a legal rule would be a rule that, if violated, would be sanctioned by the use of force by a person or group of persons that has "the socially acknowledged privilege to act in such manner" (Adamson E. Hoebel).

Such a definition may sound convincing in the context of public or international law, however, there are sophisticated legal systems that do not provide for the use of force, but rather for a variety of other sanctions (prescribed, for instance, by modern-day ecclesiastical law). Moreover, consequences also accompany the violation of rules that are not laws: a person who violates rules of custom, for example, may be dishonoured.

A saying, cherished by English legal scholars, seems more to the point: "we associate the law with the courts, the courts with the magistrates" (Patrick S. Atiyah). A legal system is a system of rules whose enforcement is entrusted to the authority of a court.

This is what characterizes any complex network of rules that regulates a social group, be they rules that control the activities of a State, Church, association or international organization; even rules of the *underworld*, or those imposed by the leaders of organized crime, whose legal system, though unlawful and contrary to morality, is nonetheless "genuine".

The selection of applicable rules

Viewed from inside, the most direct and effective way of grasping an issue is to put yourself in the place of a court or the people who turn to it for redress and are to be judged by it.

The court is called upon to determine who is in the right and who is in the wrong and is vested with the power to decide the case. On what rules is its decision to be based?

In a primitive or elementary society, the court wields the power to adjudicate even in the absence of a criterion that would direct it to draw its decisions solely from a certain source: in seeking a fair resolution, it may be guided by precedents, customs, the opinions of wise men, or even God.

However, as society becomes increasingly complex, a clear line is drawn and a discriminating criterion between the rules that a court applies in deciding a case and those that do not have such a quality is introduced. At a certain stage of such development, the court is no longer free to draw its decision from whatever source it may choose.

Above all, judicial precedents – the way cases were previously adjudicated – tend to prevail, as continuity and the coherence of court rulings lend credibility to the judicial function. The opinions of legal scholars may also come into play.

At times, the rules formed out of such sources may be collated in official collections which will acquire the authority of texts of reference.

Lastly, other rules may be expressly dictated by an authority having the power to do so. Eventually legal rules assume characteristics that distinguish them from moral rules and customs. The legal system is unique precisely because law-making has to follow specific avenues. A **legal rule** is solely that which is formed out of one of the "modes of production" prescribed by the system itself.

3. Sources of law

As can be inferred from what has been briefly outlined, a **source of law** can preliminarily and broadly be defined as any act or fact from which the law originates or can be obtained in a given system. On their face, the different legal systems in contemporary and former societies exhibit a large variety of sources.

Written and unwritten sources

Traditionally, a distinction is made between *written and unwritten sources of law*. In the former case, rules are laid down in written texts (like acts of Parliament or case law). Not only are cases often written but, as is the case with acts, they may equally be analysed according to the rules of semantics or hermeneutics (interpretation).

Unwritten sources of law are laws that are inferred from a diversity of contexts – for example, customs.

Legal sources

In contemporary systems, one may roughly distinguish between two prevailing types of sources: case law and legislation.

Judges hear and decide cases. In so doing, a **precedent** is created, which is a decision already rendered in a case or in a series of cases similar to the one to be decided. From this **case law**, a rule is formed that may become a criterion – although never binding – for resolving other similar cases. In Italy, as in any civil law jurisdiction, a precedent has generally then a persuasive force, since it may guide the judge in making the decision in a subsequent case.

Legislation

Legislation is a process that may vary in complexity. It is the means through which an authority, vested with the power to legislate (to make laws), draws up a text

containing legal rules. This may take the form of acts (also known as statutes or laws) or statutory instruments (a term that denotes subordinate laws; these may be in the form of decrees, regulations, *etc.*).

In systems where case law was originally the principal source of law, such as the English system and subsequently the American one (referred to as the "common law"), legislation has come to play an increasingly major role in recent centuries. Conversely, in systems that have traditionally relied on codified rules (like most Continental or "civil law" countries in Europe) case law, which was once not accepted as a source of law, is now significant in determining the course of the law.

The legislative process

In every system there are laws setting forth the ways and means through which the laws of that system are to be legitimately drafted and passed.

Often, as is the case with the Italian legal system, for example, specific provisions expressly lay down the sources of law. Thus, Art. 1 Preliminary Provisions to the Civil Code lays down such a list (although not updated) of private law sources, beginning with statutes or laws (in Italian *leggi*), which rank above all other sources (see para 4).

Art. 70 of the Italian Constitution (**Const.**) elaborates on this by stating that the two **Houses of Parliament** (*Camera dei Deputati* [the Chamber of Deputies] and *Senato della Repubblica* [the Senate of the Republic]) have the power to legislate.

Even where a rule does not expressly exist, it may be deduced from the evolution of the system as a whole. The sources of the ancient Roman legal system, for instance, can be listed even though that system did not rely on written formalities on the making of laws.

Today, however, the rules that govern the making of laws in a legal system are themselves regulated by specific rules. In turn, those rules, too, are drafted and subjected to the legislative process. Art. 70 Const., for example, is part of a text (the Constitution) that was ratified by the Constituent Assembly, *i.e.*, the parliamentary chamber that wrote the Italian Constitution.

As a matter of principle rules that govern the making of laws themselves have to be "legitimised" by a higher rule that provides for its making: as such legitimation process would stretch to infinity, from time immemorial, the sources of the whole legal system have always been *historical events*. Ultimately, the legitimacy of a legal system stems from it affirming itself as such.

4. The legal system

Following historical events, and through various sources, a legal system is established. It can be described as a complex of legal rules forming a uniform and orderly whole, precisely because they have been drawn from an ensemble of sources and legitimised by founding acts which paved the way to the organization of a social group.

One must be selective in considering sources for a legal system. Only those rules that are traceable to legitimate processes may be part of the body of laws. As a result, and viewed from inside the system, what is "legal" is only what the system itself has defined as such and is traceable to legitimate sources.

A plurality of systems

From the Italian point of view, only **domestic law** is applicable. The laws of another State or the laws of the Church are – as a matter of principle – mere facts.

Similarly, from the point of view of, for instance, the French legal system or that of the Roman Catholic Church, the law is the set of rules made under such systems, while Italian law stands as a mere fact.

Understanding the *relativity* of the concept of law, and accepting the *plurality* of systems, is necessary for any layman observing all these systems.

International law, which regulates relationships between States, draws upon its own sources and rules – in particular, international customs and treaties – which every State, as a member of the international community, is bound to observe. Conduct of a State that violates international rules is unlawful under international law.

However, viewed from inside each State system, the perception may be quite different: for example, what may be unlawful under international law may be lawful under domestic law.

The very rules laid down by an international convention approved by Italy, for instance, take effect in the Italian legal system only subsequent to its approval (so-called "**ratification**") by the two Houses of Parliament (similar domestic provisions may be found in virtually any State).

Yet, Italy's legal system is far from impervious to international law: Art. 10 Const. states that the Italian legal system "conforms to" the generally recognized principles of international law, *i.e.*, to the customs and principles of international law. Also, Article 117 of the Constitution, as amended by Constitutional Law No. 3 of 18 October 2001, stipulates that legislative power must be exercised in compliance with the constraints deriving from (EU law and) international obligations.

Open and closed legal systems

Single rules of law may be selected with greater or lesser rigidity.

It may be decided, for instance, that only rules expressly passed by the legislative authority shall be valid.

Conversely, it may be decided that a court has the discretion (at all times or in certain cases only) to determine – along lines inspired by sources other than formal acts of Parliament such as statutes (laws) or decrees – cases: for instance, by referring to natural law, opinions of legal scholars, or equity (that is, a principle of material justice). In this case, all these elements come together as part of the legal system.

Generally, societies that draw a clear line between codification powers (the legislative power, *i.e.*, the power to make rules) and judicial powers (the power to decide

disputes and enforce sanctions) have a closed system of sources, in which a court may not render a decision amounting to a new binding legal rule.

The line is less clear in societies where case law is the source of law or, more to the point, where a part of the body of law is formed by judicial precedents. Such systems are no less closed, however, as a single court cannot make a decision based on a principle of justice drawn from sources extraneous to the legal system, but rather must always and only have recourse to legal rules entrenched in the system itself.

A fully closed system, however, is unattainable.

Rules of law, whatever their shape or form, are prescriptive propositions, couched in the words of language. Any worded message may be construed in many different ways, all of which are compatible with the wording of the rule.

Such an operation is influenced by ideas, judgments, and values acquired by the court through experience and observation of social life.

The legal system itself aims to provide some leeway in the application of the law. In many cases, lawmakers find it convenient or necessary to have recourse to so-called *general clauses*, *i.e.*, concepts whose application to real life cases requires courts to make an assessment on a case-by-case basis (such as the concept of "good faith," the concept of "fair dealing," or the concept of "decency"). Thus, the rule is worded in order to enable a court to evaluate the facts in question in light of all relevant circumstances, including the evolution of society.

5. Sources of Italian law

Art. 1 Preliminary Provisions to the Civil Code lists the sources of Italian law as follows:

1) laws (*i.e.*, *ordinary law*);

2) *domestic* regulations (as opposed to European Union-regulations);

3) customs.

This provision, as such, was vested with constitutional status and has been part of the Civil Code since coming into force on March 16, 1942.

The **Constitution of the Italian Republic** was promulgated on December 27, 1947 and became effective on January 1, 1948. Since then, the Constitution has stood as the primary source of law in Italy.

The reason for this is that the Italian Constitution goes beyond delineating the structure of the State and the functions and powers of the main constitutional bodies. Its first section lays down the fundamental rights and duties of citizens towards not only the Republic but also towards one another.

In doing so, it lays down fundamental principles guiding human conduct in a variety of undertakings: civil, ethical, economic, and political.

With respect to sources, the Constitution modified the whole structure of the State as it stood at the time of the promulgation of the Civil Code. The Constitution, however, does not include provisions comparable to Art. 1 Preliminary Provision to the CC. Hence, the latter remains effective, subject to the following clarifications:

1) as regards *ordinary law*, the term encompasses all enactments within the legislative function as prescribed in the Italian Constitution, that is:

a) **statutes or acts of Parliament**: these are made in conformity with appurtenant procedures laid down in Art. 70 Const., *i.e.*, approval by the two Houses of Parliament, promulgation by the President of the Republic, and publication in the *Official Gazette*;

b) **legislative decrees** (made by the Government on delegated legislation)[1] and **decree-laws** (made by the Government in "*cases of extreme necessity and urgency*", to be subsequently approved – and thus turned into statutes – by the two Houses of Parliament within 60 days [Art. 77 Const.]);

c) **regional laws and laws of the autonomous provinces of Trent and Bolzano**: the Constitution grants regions and the autonomous provinces of Trent and Bolzano the power to legislate (Art. 117 Const.). In order to preserve the consistency of the legal system, *i.e.*, to prevent conflicting provisions between the laws and acts passed by Parliament and those issued by the regions and by the autonomous provinces of Trent and Bolzano, Art. 117 Const. prescribes that, on issues within the jurisdiction of the State (which are explicitly listed in Art. 117 Const.), the regions and the autonomous provinces of Trent and Bolzano must respect the fundamental principles set by the State, within whose limits the latter must exercise their legislative autonomy. Whenever a conflict arises between regional and state law, the Constitutional Court is called upon either by the government, by one or more region(s), or by the autonomous provinces of Trent and Bolzano to decide the matter thereby resolving the conflict;

d) **referendums**: according to Art. 75 Const., when requested by either 500,000 voters or by five regional councils, a popular referendum decides on total or partial repeal of a law or other acts with legal force; no such referendums, however, are allowed for tax laws (for reasons that can be easily imagined) or budget laws or for amnesties, pardons[2], or ratification of international treaties. The referendum succeeds if a majority of those eligible participate and if the proposal receives a majority of the valid votes.

2) *domestic* **regulations**: these are known as *delegated and subordinate legislation*. They may be issued by the Council of Ministers, ministries, regions, provinces, or municipalities.

3) **customs** or **usage**: these are among the subsidiary sources of law. They are the lowest source of law.

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1. According to Art. 76 Const., "*Legislative power may not be delegated to the government unless parliament specifies principles and criteria of guidance, and only for limited time and well-specified subjects*". Clearly, Art. 76 Const. aims at preserving the principle of separation of powers (legislative, executive and judiciary).

2. According to Art. 79 Const., amnesties and pardons may be granted by a law which must be adopted both article by article and in its entirety by two thirds of the members of each Chamber of Parliament. In no instance may amnesty or pardon be extended to offences committed after the bill has been introduced (cf. Art. 151 Criminal Code).

Amnesty may be given to persons who have not faced trial and been convicted, while pardon is awarded to persons who have been convicted: differently from amnesty, which also obliterates all legal remembrance of the offense, the pardon does not remove any incidental effects of a criminal conviction, such as a mention in a certificate of conduct (unless the decree of pardon states otherwise: cf. Art. 174 Criminal Code).

In order to form a custom, a certain pattern of behaviour must meet the following criteria:

a) it must be general, repeated, and constant within a certain community; and

b) members of that community must observe it in the belief that they are bound by that "rule of behaviour", *i.e.*, as if it were a rule of law.

A distinction is drawn between customs in areas not regulated by other sources of law (so-called customs *praeter legem*) and customs explicitly referred to by higher sources of law (so-called customs *secundum legem*).

An example of a custom in an area not regulated by other sources is, according to Italian jurisprudence, the duty of winners to leave a tip to a *croupier* in an authorized gambling house.

An example of a custom explicitly referred to by a higher source, in this case the Civil Code, is Art. 1498 CC, which states that in a sale, in "*the absence of agreement and* where no other customs apply*, payment must be made at the time of delivery and where such delivery is performed*"[3].

6. Relationship between sources of law

The presence of several **sources of law** may give rise to *competition* between legal rules concerning the same subject matter.

As long as the various rules do not conflict between themselves, the rule created by one source stands and is added to the rule created by another. For instance, when a statute is followed by a domestic regulation which provides for implementation procedures designed to determine the ways and means of its application, the statute and the regulatory provisions on implementation together make up the set of legal rules aimed at governing the subject matter.

However, a conflict may arise between different sources of law. In such a case, it is necessary to examine the *rank* and *competence* of the respective sources.

If sources are different, but of equal *rank* (for instance, a law and a legislative decree or a law and a provision of the Civil Code), then the *conflict* between them will be determined by referring to chronology: indeed, the law most recently enacted prevails over the previous one (as the latter is deemed to have implicitly *repealed* the former: cf. § 11 *below*).

Conflict between successive laws needs *not* be resolved by *repeal* when the new law does not apply to the whole of the matter regulated by a previous source, but rather modifies only some points thereof. In such a case, the earlier law remains in force in its broader applications.

3. As – similar to *any* source of law – customs may not conflict with *higher* sources of law (cf. § 6 *below*): hence, so-called customs *contra legem* (*i.e.*, customs conflicting with higher sources of law) exists solely as an academic concept.

Conversely, when a law with broad and general application provides for different solutions to issues already governed by pre-existing specific legal rules, the previous rule may remain in force.

Where sources of law are not of homogeneous *rank*, *i.e.*, they are not of equal weight (*e.g.*, a statute/law in conflict with the Constitution or a [domestic] regulation in conflict with a statute/law), the **principle of hierarchy** applies, which holds that the law superior in *rank*, and not the last enacted, prevails. Hence, the legal rule drafted by a subordinate body (and hence of subordinate source), though enacted more recently than the one originating from a higher source, shall not be applied.

In the case of a suspected conflict between ordinary law and the Constitution, the question of whether the statutory provision (or any law of equal weight) is – as legal scholars used to say – "unconstitutional" will have to be raised by the court called upon to apply the provision which *prima facie* appears "unconstitutional". However, such court does not have the authority to decide upon its nature. Indeed, the question of whether a statutory provision (or any law of equal weight) conflicts with the Constitution will have to be submitted to the Constitutional Court, which is the only body vested with the power to evaluate the conformity of ordinary law and other sources of the same *rank* to the Constitution.

By contrast, in the case of a conflict between any other source lower than ordinary law, any court may assess the validity of the higher source on a case-by-case basis (for instance, in the case of a conflict between *i.*) a domestic regulation and ordinary law or *ii.*) a custom and the Constitution, the court to which the case has been submitted will directly decide that - in both cases - the latter will prevail).

7. European Union sources

Since Italy is a Member State of the European Union, the Italian legal system also comprises the following sources of law:

a) the founding **Treaty of the European Community (TEC)**: modified by the Single European Act in 1987, the **Treaty on European Union** of Maastricht in 1992, and the Treaty of Amsterdam in 1997, which in turn was amended by the Treaty of Nice in 2001 and by the Treaty of Lisbon in 2007, which renamed the TEC the "**Treaty on the Functioning of the European Union**" (**TFEU**);

b) **regulations** (to be distinguished from *domestic* regulations): the Council of the European Union may enact regulations that have immediate and direct effect in its Member States and prevail over diverging *domestic* laws (cf. Constitutional Court, judgment of June 5, 1984, No. 170);

c) **directives**: one of the objectives of the European Union is to harmonize the legislation of its Member States.

The TFEU provides that the European Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties (Art. 26 TFEU – formerly Art. 14 TEC). To that effect, the Council of the European Union shall, acting unanimously in accordance with

a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations, or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market (Art. 115 TFEU – formerly Art. 94 TEC).

In Italy, Law 4 February 2005 No. 11 amended the procedure for the implementation of European Union directives. Each year, before March 1st, a bill referring to the "*provisions for the discharge of duties pursuant to the membership of Italy to the European Community*"[4] must be submitted to Parliament. The act, known as the **Community Act**, provides for the repeal or amendment of laws in force that conflict with Italy's duties under European Union law *and delegates to the government the authority to implement a series of directives* under terms laid down by the act itself. The government then discharges this duty by enacting a legislative decree.

In order to establish a functioning internal market, European institutions shall adopt regulations, directives, decisions, recommendations, and opinions (Art. 288 TFEU – formerly Art. 249 TEC). A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (Art. 288 TFEU – formerly Art. 249 TEC)[5].

The Court of Justice of the European Union (colloquially known as the European Court of Justice – **ECJ**) has stated the *direct effect* of European law in Member States (cf. § 8 *below*), according to which unimplemented or badly implemented directives can actually have direct legal force, as well as the **principle of precedence of European law** (cf. § 9 *below*), which sets out that European law is superior to the national laws of Member States.

Consequently, the enumeration of sources of law must be rewritten in the following hierarchy:

1) the **Constitution**;

2) the **Treaty on the Functioning of the European Union and the sources of European law set forth therein** (regulations and directives);

3) **laws of the State, of the regions, and of the autonomous provinces of Trent and Bolzano** and other equivalent legislative measures (legislative decrees, decree-laws, codes [for instance, the Civil Code, the Criminal Code, the Civil Procedure Code, the Criminal Procedure Code, the Consumer Code, the Code of the Environment]) and **referendums**: these sources are referred to as *ordinary law*;

4) *domestic* **regulations**;

5) **customs** or **usages**.

4. From December 1, 2009 (the day the Lisbon Treaty came into force), in all EU documents all references to "*European Community*" or "*European Communities*" are replaced by "*European Union*".

5. A *decision* shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. *Recommendations* and *opinions* shall have no binding force (pursuant to Art. 288 TFEU – formerly Art. 249 TEC).