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Legal Mentality and Its Influence in Shaping Legal Rules: the Relationship between Principal and Agent

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Abstract:
It is assumed that comparative legal studies, through its deep and historical analysis of law and its dissociation in legal formants, have contributed to understanding the importance of the different factors that shape legal rules. In this article, emphasis is given to a factor that is sometimes neglected in legal narrations: legal mentality or, more simply, the inherent logical way of thinking and its influence in shaping legal rules. The area of investigation is the legal relationship between principal and agent. It is a narration that selects a specific "fil rouge" to link different "pieces" throughout European history to compose a mosaic of different factors that may have contributed to developing a certain legal mentality in this area of law. The legal mentality is nothing more than the product of the extra-legal contexts in which principal and agent operate. In reference to the extra-legal context, it means the importance, above all, of the situations of proximity between the two parties: proximity that could be "spacial" (*i.e.*, they are part of the same small community), or "relational" governed by extra-legal forms of belonging to the same group, for instance families (broader or narrower ones) or clans. This narration starts with a glance at the ancient agreement of *mandatum* and its roots in the Roman idea of "friendship" and personal bond. Then it continues by touching on a source of the medieval companies: the family bond, one of the stronger and more trustworthy relationships at the time. It will be shown that some aspects of that relationship are not dissimilar from the ones later formed by the case law of the English Chancery Court in the field of the law of agency. This could be seen as a result of the legacy of the stratification of a certain legal mentality shaped by a context that was created by extralegal relationships. Nowadays the modern fading of the personal bond between principal and agent has highlighted an important evolution: there was proximity then depersonalization: this is reflected in the evolution of legal rules, for instance, in French, Italian and English national law. Finally, the case of the "real" or "absolute" irrevocability of the authority shows that the agency relationship, constructed in a breeding ground characterized by trust and utilized to protect the principal's interest (or even the principal's interest), could become - through related or linked contracts - an instrument of more complex agreements. In these cases, the interest of the agent or third parties (such as creditors, contractual counterparts or "beneficiaries" in the broad sense) could lead those transactions far from the original idea of *mandat* or *mandato* or agency. In those situations, the "causa" of the agency (to use a concept dear to civil law tradition) changes and its roots in personal bond and the principal's interest loses its strength as it is mirrored, once again, in the legal rules.

Keywords: agency, agent, comparative law, legal mentality, principal

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1 Introduction

It is assumed that comparative legal studies, through its deep analysis (even historical)[1] of law and its dissociation in legal formants[2], have contributed to a better understanding of the importance of the different factors that shape legal rules.

The most well-known legal formants are: legislation, case law and academic legal doctrine. However, it is also very well known that their importance has different weight in different legal systems[3] where other factors - such as religion or philosophy – could play a fundamental role[4].

In this article, emphasis is given to a factor that is sometimes neglected in the legal narrations: legal mentality or, more simply, the inherent logical way of thinking and its influence in shaping legal rules[5]. The area of investigation is the legal relationship between principal and agent[6].

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It is a narration that selects a specific “fil rouge” to link different pieces throughout European history that may have played a role in shaping some aspects of their legal relationship. It is not the evolution of a single set of rules, but a study of different factors that may have contributed to developing a certain legal mentality in this area of law.

This narration starts with a glance at the ancient Roman agreement of *mandatum* and its roots in the Roman idea of “friendship” and personal bond. Then it continues by touching on a source of the medieval companies: the family bond, one of the stronger and more trustworthy relationships at the time. It will be shown that some aspects of that relationship are not dissimilar from the ones later formed by the case law of the English Chancery Court in the field of the law of agency. This could be seen as a result of the legacy of the stratification of a certain legal mentality shaped by a context that was created by extra-legal relationships.

Legal mentality is nothing more than the product of the extra-legal contexts in which the principal and the agent operate. In reference to the extra-legal context, it means the importance, above all, of the situations of proximity between the two parties: proximity that could be “spacial” (*i.e.*, they are part of the same small community), or “relational” governed by extra-legal forms of belonging to the same group, for instance families (broader or narrower ones) or clans.

Comparative analysis highlights how the rules comply with the prevailing mentality, which is strictly dependent on extra-legal contexts. For instance, this is specifically apparent in Roman law, more or less archaic, where the “proximity relationship” and its degrees were fundamental. *Fides* did not need to be legally regulated because they were surveyed by the “mores”, in the sense that the one who betrayed “fides” was banned by the family or clan community[7]. Nowadays the modern fading of the personal bond between the principal and his agent has highlighted an important evolution: there was proximity then depersonalization[8]. This is reflected in the evolution of legal rules. If it is true, on the one side, that the idea of confidence, understood as the Roman “officium et amicitia” and linked to a so-called “psychological” element, is currently little more than a memory (due to the “depersonalization” and professionalism of the agent), on the other, it is not so true that the fiduciary element has completely disappeared. The agent acts as a fiduciary because he protects the principal’s interests. This statement seems to confirm the idea that confidence is interpenetrated within the relationship between principal and agent, even if from a different standpoint. The principal’s power to revoke the authority at will (*i.e.*, the unilateral termination of the relationship), could be seen as a manifestation of this side of their legal relationship. However, the metamorphosis of the extra-legal context, the depersonalization of the relationship between agent and principal, has required some changes. For instance, in the direction of agent protection: the French operative solution illustrates this point. Similar solutions have been adopted by other European national rules, as will be discussed.

Finally, the case of the so-called “real” or “absolute” irrevocability of the authority shows that the agency relationship, constructed in a breeding ground characterized by trust and utilized to protect the principal’s interest (or even the principal’s interest), could become - through related or linked contracts - an instrument of more complex agreements. In these cases, the interest of the agent or third parties (such as creditors, contractual counterparts or beneficiaries in the broad sense) could lead those transactions far from the original idea of *mandat* or *mandato* or agency. In those situations, the “causa” (to use a concept dear to civil law legal tradition) of the agency changes and its roots in personal bond and the principal’s interest lose their strength as mirrored, once again, in the legal rules.

2 *Mandatum*

A European historical perspective would not be complete without at least some consideration of the influence of Roman law on the civil law tradition[9].

Roman society - characterized by social classes divided into masters and slaves, the concept of *pater familias* that could act through his children in power, and the acquisition of the spoils of war between nations - was not compelled to adopt all of the legal that would be needed later, especially for international trade. However, if on the one hand the relationship between principal and agent in early Roman society would have been of little utility for the aforementioned reasons, on the other, the commercial expansion following the progressive territorial conquests of Rome, the prolonged absences and the long distances required some legal tools in order for merchants to entrust others with the handling of some affairs[10]. Thus, despite Roman law did not recognize a general concept of agency[11], it permitted individuals to act - albeit with specific modality - through others in certain circumstances. One of the ways people acted through others was via the *mandatum*.

While there is no single theory of how the *mandatum* was introduced into the Roman legal system, some[12] believe that the Romans, as part of the *ius gentium*, were influenced by the people of the Mediterranean Sea and recognized the practical value of a series foreign commercial devices, including the *mandatum*[13]. At the

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same time, others believe that the origin of *mandatum* was typically Roman: it provided protection in the *Ius Civile*, based on the existence of a special relationship between the parties to a contract[14]. Subscribing to this theory means that the bond between the *mandatarius* (agent) and the *mandans* (principal) initially operated at a customary level (based on social morality) and only later at a legal level[15].

In any case, whether it was learned from others or was typically Roman, the *mandatum* had a definite physiognomy founded on the Romans' extralegal social-value system[16]. It was a gratuitous consensual contract in which one person (the *mandatarius*) promised to do or give something, without remuneration, at the request of another (the *mandans* or the *mandator*), who, on his part, undertook to save him from all losses. The *mandatum* could be in the interest of the *mandans*, of the *mandatarius*, a third party, or combination of the three[17]. However, the *mandatum* concluded in the sole interest of the *mandatarius* (*tua gratia*) was void as it was at best considered to be "advice".

To understand the gratuity requirement of this agreement the more acceptable explanation appears to be the one based on the fact that the *mandatum* was rooted in a relationship of "pure and disinterested friendship and trust"[18]. Indeed, Cicero and Seneca regularly affirmed such basis[19]. *Mandatum nisi gratuitum nullum est: nam originem ex officio atque amicitia trahit, contrarium ergo est officio merces: interveniente enim pecunia res ad locationem et conductionem potius respicit*[20].

From a Roman perspective, being a *mandatarius* was highly honorable; the contract of *mandatum* was based on trust and friendship and good competence[21]: only such kind of people could be chosen as *mandatarius*[22]. Thus, this requirement appears to reference the subsystem of the social and moral order of the family.

It is important to add that the Roman concept of *mandatum* was extended to services that were not considered *locatio operis*, such as professions pertaining to liberal arts and/or the sciences. Physicians, orators, masters of grammar, jurists, lawyers, accountants and the like were *mandatarius*. With the passage of time, on grounds of fairness, it was recognized that such activities could be rewarded by an "honor" or "salarium"[23], and later it was admitted that a compensation could be agreed upon between the parties of the *mandatum*. However, the *mandarius* was barred from bringing the *actio mandati contraria* in order to receive his remuneration[24]: rather than break from its origins as a gratuitous contract, remuneration was achieved through the *cognitio extra ordinem*[25].

After a long historical evolution, it is generally affirmed that the contract of *mandatum* diverged from the employment contract for a number of reasons. In this context it is worth remembering that: the *mandatum* concerned some services; to be a *mandatarius* was an honor; the *mandatum* assumed continued confidence in the *mandatarius;* and the *mandans* could terminate the contract at will[26].

This scheme of the *mandatum* was overly broad and its extent hid an amphibology. In the family relationship there is a clear hierarchy between son and father, while the relationship between a professional (*e.g.*, a lawyer) and his client is less straight forward; the professional is not the "father" despite the client's position somewhat resembles aspects of the *filius* (albeit by nature different from that of the *pater*). Indeed, this relationship is so complex that it took centuries for it to become balanced between both free men. In any case, it is significant that individual relationships mimic and adapt to fluid social hierarchies.

3 The medieval merchant family

From the early Middle Ages, merchants began performing commercial activities in the countries bordering the Mediterranean Sea and beyond. This kind of international trade required, among other things, merchants to be commercially present in different markets without being physically present in the same, causing merchants to employ trusted agents that would represent them and their interests. Those needs were satisfied by developing various forms of medieval companies and the merchants' family was one of the origins of those companies[27] . During the Middle Ages, it may be said that merchant families were more concerned with maintaining and defending the socio-economic prestige and political power they had gained through their commercial activity more than the so-called "universe of affection" that binds close relatives and characterizes the modern family relationship[28]. As such, members of such families were consequently charged with managing potentially huge economic activities. In the beginning, there were small family partnerships[29] composed of people living under the same roof and sharing the same bread[30], where the *pater-familias* led the business with the concentration of decision making power and direction. The family was organized under the *pater-familias* who was the undisputed head of the family group. The sons were collaborators who were provided with only limited autonomy, tools to ensure the father was free to engage in his political or business activity[31]. The family was a single entity to which the business could and should be attributed. Mutual control over his members was tight[32]. In this context, the sons (or relatives) were the most loyal agents. The business relationship was marked by mutual confidence and fiduciary duties. All members of this group shared a "common honor": the fault of one was considered a general disgrace of all, and an offense to one was an offense to all. This imposed an irreproachable

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behavior on everyone in dealing with family business[33]. The case was similar to the Mediterranean Roman civilization. The isolated individual who was expelled from the family became a pariah whose survival was difficult. And such possibility of expulsion was considered by young people. This context was far from the situation of the professional lone (or nearly lone) merchants or traders.

The merchants' sons were often in charge of breaking into new markets and opening branches abroad. Indeed, most European languages use synonyms for family abode to represent both familiar dwellings and places of business. For instance, in Italian, the word "casa" may refer to both the place where a family lives or the location of a commercial enterprise. The same is true for the English word "house", the German "haus" and the French "maison"[34]. Moreover, in Italian, French and Spanish, the name for the branch of an enterprise often has roots in the Latin word "filius", which means "son".

When the companies grew and greater funds were required, other people were admitted: people from a wider circle of relatives and lastly strangers[35], thus marking the development of different kinds of companies that were no longer comprised solely of family members.

However, it seems that a certain legacy with the first root remained in some sides of this relationship, such as the confidence and trusted relationship and the fiduciary duty between principal and agent, which may be found in different countries. For instance, in the English law of agency[36] , the principal and agent were linked by a relationship based on confidence in the agent, and a series of fiduciary duties were consequently assigned to him[37] . Historically, the agent's fiduciary duties are generally seen as an extension of the law of trusts due to the work of the Court of Chancery that imposed freely these fiduciary duties on agents, without bothering to verify that their source came from an agreement between the parties[38]. It has been affirmed that "English law rejects the notion that trusts are contracts, or that fiduciary obligations are contractual in nature, even when they are undertaken consensually" not merely because of the historical link between trusts, fiduciary obligations and the equitable jurisdiction of the Court of Chancery, but rather due to "the fundamental idea under English law that contracts are self-regarding acts in which each party to the transaction must be presumed to be pursuing his or her interest"[39]. The words of Judge Mc Cardie summarize this historical evolution highlighing that the position of the principal and agent gives rise to particular and onerous duties on the part of the agent, and the high standard of conduct required from him springs from the fiduciary relationship between his employer and himself. His position is confidential. It readily lends itself to abuse.

> Judge Mc Cardie affirmed "The rule of English law as they now exist spring from the strictness originally required by Court of Equity in cases where the fiduciary relationship exists"[40].

Through the centuries, merchants' concepts were received by the Chancery Court and, through this mediation, reached the common law.

The fiduciary duties - notwithstanding their foundation in ecclesiastical courts[41] or the law of trusts - also seem to be the product of the stratification of a certain mentality that had been developing in the Western legal tradition.

The similarity of different European experiences is not surprising since the European merchants worked in a world without distinct borders: they were a community despite their different local customs. The English law of agency[42], whatever its root[43], and the several historical contributions to its formation, greatly developed in the age of commerce[44].

The merchants aimed to escape from local customs and courts (especially when they were foreign ones) and aspired to a supra-national law and court system[45] where they felt more protected by a common system of law, based on mercantile interests[46], where the "primary source of the Law Merchant lay in mercantile values"[47]. The Law Merchant has been described as the "Private International Law" of Middle Ages[48].

4 The principal's power of revocation and protection of the agent

The relationship between the medieval merchant principal and his agent was founded on trust and confidence. It was a corollary that the principal had the power to revoke the agent's authority at will, since the agent had to act in the principal's interest or even in the principal's interest (illustrating a similar relationship to that between the bond between the *mandans* and *mandatarius* on this issue). The principal needed a tool that would allow him to protect his interests also via termination of the legal relationship, regardless of the reasons for that choice and, above all, regardless of any proof of the agent's fault or breach. At the same time, the nature itself of the fiduciary relationship between the parties, as already described, offered protection to the agent.

Nowadays the personal bond between the principal and his agent has faded, highlighting an important evolution: before there was proximity, then depersonalization[49]. This development is reflected in the evolution of legal rules. The relationship between principal and agent transferred from the context of individual relations to that of the business organization and, in particular, to the networks of companies is subject to metamorphosis.

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The French evolution of the usage of the *mandat* illustrates some aspects of this issue[50]. In France, the current use of the *mandat*[51] is far from the one originally conceived by Domat and Pothier (which is closer to the Roman law model)[52], although the articles in the French civil code seem to be the continuance of the traditional idea[53]: case law has made great efforts to modernize this contract[54]. Some important developments, among others, that are found in this area of law are the professionalization of the *mandataire* and the enactment of special statutes on the subject-matter. The need to protect the "professional" *mandataire* played a central role in this process. Specifically, in as early as the mid-nineteenth century, the number of legal actions arising from the use of the *mandant*'s power of revocation against the *agents d'assurances* multiplied significantly[55]. In the context of insurance companies, the *mandant* could terminate the relationship at will, since the French civil code provides that: "*Le mandant peut révoquer sa procuration quand bon lui semble et contraindre*" (art. 2004 c.c. Fr.). At first courts resolved such disputes by assuming the existence of tacit clauses within the *mandat*, based on the interpretation of art. 1135 of the 1804 civil code, which affirmed: "*Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature*"[56]. Judges evaluated the legitimacy of the revocation not only based on what was written in the contract, but also based on equitable principles, usages, and the applicable general provisions of law. This meant that judges used what it could be described as "good faith" to interpret the contract of *mandat.*

Case law showed how the theory of abuse of right was used in attempt to justify the *mandataire*'s claim that the *mandant* is liable for "abuse", therefore warranting damages in favor of the *mandataire*. However, this interpretation was criticized and substituted by idea of *révocation abusive*, according to which: "*la liberté, comme toujours, ne doit pas dégénérer en abus: des dommages et intérêts peuvent venir censurer une révocation abusive, c'est-à-dire fautive, car brutale et intempestive*"[57], *i.e.*, if the *revocation abusive* functions to harm, or if it is used with deplorable levity[58]. For example, a *mandat* has been illegitimately revoked when the purpose of such revocation was for the *mandant* to steal the *mandataire*'s customers[59]. In this case, the *mandataire* may be awarded damages. The same result (i.e., damages) is achieved when a *mandat* contract with an irrevocability clause has been revoked. This clause has "relative effectiveness": it does not prevent the *mandant* from revoking the *mandataire*'s power. If it is a "fautive" revocation it only requires the *mandant* to pay damages to the *mandataire*[60], such as when revocation is made without reasonable notice in the case of a *mandat* for a single service or fixed-term, or for an indefinite period. Even in the case of "*mandat d'intérêt commun*"[61] the *mandant* may still revoke the contract but, in absence of a just cause (*i.e.* good reason), the *mandant* is required to compensate the *mandataire* for damages.

It appears that the balance between the *mandant*'s power to revoke and the *mandataire*'s rights has been found in the monetary relief for the *mandataire* in case of unfair revocation.

The Italian model of the *mandato* contract derives from the French one: the Italian civil code allows the "mandante" (*i.e.*, the principal) to terminate this contract at will, albeit within certain limits (which will be discussed later)[62]. The balance between the rights of the *mandante* and those of the *mandatario* (*i.e.*, agent) lies in the legal discipline according to which the *mandante* must pay damages to his *mandatario* when the *mandante* revokes the *mandato* for a single service or fixed-term before the moment agreed, or when the *mandato* runs for an indefinite period and is revoked without reasonable notice[63]. The principal has the right to revoke the *mandato* without paying damages only when a just cause for revocation exists. In the event that the parties have stipulated an irrevocability clause, the principal may still revoke, but he is obliged to pay damages in absence of a just cause for revocation[64].

English law takes a similar approach to the same hypothesis. According to English law, the "rule" is that the principal has the power to revoke the authority[65] at his will. This power appears founded on the recognition of the fact that the principal can freely manage his own business[66]. If the agency derives from contract - as it invariably will - and the principal unilaterally revokes and wrongfully terminates the contract, he may be liable to the agent in damages for breach of contract. In any case the revocation is effective.

The transformation of the *mandataire, mandatario* or agent (with all the consequences already mentioned) distances those figures from the origin of their relationship and brings them closer to the figure of the "commercial agent". As known, one of goals the European Commercial Agents Directive of 1986 (largely derived from French and German law) was to support the agent's position, especially against unfair revocation by the principal. Stability and normal exclusivity of the relationship primarily creates a certain economic dependency of the agent on the principal. As a result, the legal regime of the current principal-agent relationship resembles, in some respects, a type of subordinate employment.

The lack of proximity between the "principal" and the "agent" illustrated thus far is reflected in legal rules.

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5 Irrevocability

A brief discussion of the case of "irrevocable" authority illustrates a different side of the principal-agent relationship. As stated above, different legal systems allow the principal to terminate the relationship at will, despite any contrary prior agreement: French, Italian and English rules provided that the *mandat*, *mandato* or authority are revocable for their own nature[67].When this happens, the most relevant consequence is that the principal is liable for damages in case of unjust revocation. To be more clear, as French doctrine affirms, it is a "pseudo irrévocabilité du contrat"[68].

However, this general rule has a very important exception, which can be described as a "real" or "absolute" irrevocability (*i.e.*, the principal cannot revoke the power conferred to the agent, and in any case, such revocation is ineffective).

The Italian civil code states that a *mandato* that is also in the interest of the *mandatario* or a third party cannot be terminated neither by revocation of the principal - in absence of prior party agreement or in absence of a just cause - nor if the principal dies or become incapacitated (art. 1723, para. 2, It. c.c.). It is significant that the black-letter Italian law uses the conjunction "also" because it links the interest of the *mandatario* or the third party with that of the *mandante*. The *mandato* "survives" to serve interests different from those of the *mandante*. However, it is not easy to identify the *mandatario*'s or third party's interest. It is generally said that the proper use of the word "interest" refers to the *mandatario*'s or third party's interest, which arises from an underpinning or collateral obligation formed previously or at the moment the *mandato* is conferred. For instance, those kinds of *mandato* create an indirect legal transaction, or they are a part of a wider indirect legal relationship, or they are in the interest of a third party where the latter is the *mandatario*'s creditor, making the *mandato* a tool that satisfies his credit.

In those cases, the *mandato* survives even in the event of death, interdiction or incapacity of the *mandante*: this happens due to the need to balance the *mandante*'s interests with those of the other parties involved.

The re-occurrence of a "just cause" or a specific agreement between the parties made the generale rule that the *mandato* is unilaterally revocable by the *mandante* applicable: in both cases the need to protect the *mandante*'s interest prevails over the *mandatario* or third party's interest so the *mandante* can revoke the *mandato*.

Another significant case of irrevocability is the *mandato* conferred by several *mandanti* (*i.e.*, principals) with a single juridical agreement and for the same business: the so-called "*mandato colletivo*" (art. 1726, It. c.c.). In this case the revocation is effective only if made by all the *mandanti*, except where just cause exists. It means that no one *mandante* has the power of revocation (without just cause): if such revocation were permitted, it would alter the interest that binds all the *mandanti*. On the contrary, when a just cause exists, the law considers the interest of the revoking party worthier of protection than the interest of the other parties involved in the legal relationship; in this case, the termination takes an "extensive" effect and provokes a complete termination of the *mandato*.

To summarize, in all cases where just cause is established, the termination by the *mandante* is effective without consequences for himself; if just cause is absent, the termination has no effect if the *mandato* is also conferred in the interest of the *mandatario* or a third party (unless otherwise agreed), or when the *mandato* is collective (unless all the *mandanti* agree that it have such effect). Simply put, when the *mandato* is absolutely irrevocable, just cause and revocation are fundamental elements: they are both required to provoke the dissolution of the mandate; if one is missing the contract survives.

In France, it has been said that the *mandant*'s freedom to revoke is so broad that it constitutes a general rule, however there are some exceptions to this general principle that include cases of "real" irrevocability, *i.e.* where the exercise of the *mandant*'s right of revocation is ineffective. For instance, when the *mandat* is an ancillary part of a main contract[69] and the entire transaction is "indivisible"[70]. Also, the "mandat collectif" is not revocable by one *mandant*. The exercise of the right of revocation, which is attributed to each co-*mandant*, is therefore affected to the existence of a common will of all of them[71]. The cases are quite similar to the Italian ones.

In the English law of agency, as a general rule, the principal can always revoke the conferred authority. However, there are two exceptions to this rule: the first one is the authority coupled with an interest, and the second one is the case of irrevocability provided by Statute[72].

In order to clear up possible misunderstandings, with the expression absolute irrevocable authority it refers to the fact that the authority cannot be revoked by the principal without the consent of the agent, not even in case of death, bankruptcy or incapacity of discernment of the principal. In such cases the revocation is ineffective and the agent may request an injunction[73]. In the first case, the authority is irrevocable when the principal and the agent have concluded a contract of agency to ensure or protect an interest of the agent[74]. The agent uses the authority for his own benefit (not for his principal's benefit)[75]. In such cases the authority qualifies as "coupled with an interest". Usually this happens when the authority is used to secure a principal's debt in favor of the agent[76].

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Part of the doctrine[77] believes that in this case it is "not really within the bond of proper agency of reasoning"[78] or even "not a true case of agency at all"[79], as the agent that receives power acts in its own interest and, in fact, the authority is a sort of security[80].

In such cases agency is used as a legal device for an atypical purpose, either to confer a security or another interest of the agent[81].

It is generally accepted that the exception is based on the legal fiction that there is an agent-principal relationship. However, the relationship between the two figures is actually of another nature: debt, execution, salt, and mortgage[82].

The second hypothesis of irrevocability is when a statute (*i.e.*, a law in the formal sense) affirms the absolute irrevocability of the authority[83].

It seems that the English doctrine is not entirely wrong when it states that cases of irrevocable authority are not cases of true agency[84]. When the agent's authority is not freely revocable by the principal, the "causa" of the relationship (to utilize a concept dear to civil law tradition) changes.

The agreement is no longer functional to the pursuit of the principal's interest. Rather it becomes an instrument to pursue a set of interests belonging to more parties on a contractual basis.

In those case the interest of the agent or third-party beneficiaries (*e.g.*, creditors, contractual counterparts, or "beneficiaries" in the broad sense), may lead the relationship between the parties far from the original idea of *mandat* or *mandato* or even agency. In those cases of "real" or "absolute" irrevocability, the "causa" of those "contracts" (to continue using a civil law point of view) changes and the idea of representation (inherent to the concept of agency in all its variations) loses his strength. In cases of this irrevocability, the relation between principal and agent undergoes a transformation because it is used as a tool for more complex arrangements to protect (including through related contracts) the interests of the agent or third parties, such as creditors, contractual counterparts, or beneficiaries in a broad sense. The different context of those agreements is mirrored in their different legal rules.

Notes

1 With reference to the teachings of the leading Italian comparatist A. Gambaro, see, for instance, C.A. Cannata,A. Gambaro,*Lineamenti di storia della giurisprudenza europea*, II, *Dal Medioevo all'epoca contemporanea*, IV ed., Torino, 1989. See also: G. Gorla, *Diritto comparato e diritto comune europeo*, Milano, Giuffrè, 1981, 4, where the author, taking up the famous Maitland's dictum "history involves comparison", affirmed that comparison involves history and K. Zweigert, H. Kötz, *An introduction to comparative law,* 3 ed., translated from the German by T. Weir, Oxford, Clarendon press, 1998, 8.

2 On famous Sacco's theory of legal formants see, for English readers, R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 The American Journal of Comparative Law, 1–26 (1991).

3 There is a great number of studies paying particular attention on different legal sources, their application in methodological approaches, and their utilization in legal classifications. See for an overview S. Vogenauer, *Sources of Law and Legal Method in Comparative Law*, The Oxford Handbook of Comparative Law, edited by M. Reimann and R. Zimmermann, Oxford - New York, Oxford University Press, 2006, 891.

4 For an innovative classification in legal families on the basis of the predominance of law, politics, and tradition see U. Mattei, P.G. Monateri,*Introduzione breve al diritto comparato*, Padova, 1997, 51.

5 On legal mentality, see: A. Gambaro, *The Trento Theses*, Global Jurist Frontiers, 4.1 (2004); R. Sacco, P. Rossi, *Introduzione al diritto comparato*, UTET Giuridica, Torino, 2015, 121; K. Zweigert, H. Kötz, *Introduzione al Diritto Comparato*, *Principi fondamentali*, vol. I, trad. it. di B. Pozzo, a cura di A. di Majo e A. Gambaro, Giuffrè, Milano, 1992, 84; C. Amodio, *Au nom de la loi: l'esperienza giuridica francese nel contesto europeo*, G. Giappichelli, Torino, 2012, 53. Cf. P. Grossi,*La proprietàe le proprietànell'officina dello storico*, Napoli, 2006, 51. For other examples of factors shaping legal mentality see M. Nacci, *San Pio X e il diritto canonico: la "cultura giuridica" della codificazione del diritto della Chiesa*, 54 Ephemerides iuris canonici (2014), 87–95 (in reference to canon law); J. Husa, *A New Introduction to Comparative Law*, Hart Publishing, Oxford and Portland, 2015, 137 (in reference to Japanese legal culture) and 228 (in reference to Nordic legal thinking).

6 In this article the words "principal" and "agent" are used with a broadened meaning. It has been decided to adopt the single national terminology to refer to specific national legal rules.

7 On *fides fallere*, see R. Lambertini, *Testi e percorsi di diritto romano e tradizione romanistica*, Giappichelli Editore, 2010, 102, specifically note 16. Generally cf. E. Betti, *Diritto romano*, I, *Parte generale*, Roma, 1935, 571; L. Lombardi,*Dalla fides alla bona fides*, Milano, 1961, 133; M. Miceli,*Studi sulla rappresentanza nel diritto romano*, I, Milano, 2008, 240–242; G. Coppola Bisazza,*Sul contratto di mandato: dalla gratuità alla presunzione di onerosità*, Ead, *Profili di diritto privato tra antico, moderno e postmoderno*, I, Milano, 2016, 65.

8 See R.E. Cerchia, *Quando il vincolo contrattuale si scioglie, Unicità e pluralità di temi e problemi nella prospettiva europea*, Giuffrè, Milano, 2012, 246.

9 There is a multitude of studies on the influence of Roman law on civil law tradition and it is not possible to give a comprehensive overview over the relevant literature. For the aims of this work it is sufficient to remember, among others, R. Zimmermann,*The Law of Obligations, Roman Foundations of the Civilian Tradition*, Cape Town [etc.], Juta & Co., 1990; Id., *Roman law, contemporary law, European law: the civil tradition*, Oxford – New York, Oxford University Press, 2001; A.D.E. Lewis - D.J. Ibbetson, *The Roman Law Tradition*, Cambridge, Cambridge University Press, 1994; P. Stein, *Roman law in European history,* Cambridge, Cambridge University, 1999; G. Mousourakis,*Roman law and the origins of civil law tradition*, Cham, Springer, 2015.

10 A. Olivieri, *Mandato Civile*, Digesto Italiano, vol. XV, Part I, Torino, 1927, 363.

11 For an overall picture on acting for others in Roman law, seeR. Zimmermann,*The Law of Obligations, Roman Foundations of the Civilian Tradition*, 49.

12 Cf. V. Arangio Ruiz, *Il mandato nel diritto romano*, Napoli, 1965, 44.

13 Cf. C. Sanfilippo, *Corso di diritto romano, Il mandato, Parte prima*, Catania 1947, re-printed in *Riv. Dir. Romano*, 4, 2004, 11, 13.

14 A. Watson, *Contract of Mandate in Roman Law*, Oxford, 1961, 16.

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15 There are also different views: for instance, there are authors who look at the relationship between masters and slaves to find the roots of the *mandatum*.
16 R. Zimmermann, *The Law of Obligations*, 415.
17 The *mandatum* could be: in the sole interest of the *mandans* (*mea gratia*), in the common interest of the *mandans* and the *mandatarius* (*mea et tua gratia*), in the interest of the *mandatiarius* and a third party (*tua et aliena gratia*), even in the interest of a third party (*aliena gratia*). Cf. L. Solidoro Maruotti, S. Puliatti, A. Lovato, *Diritto Privato Romano*, 2 ed., Giappichelli, Torino, 2017, 546.
18 See P. Birks, *The Roman Law of Obligations*, edited by E. Descheemaeker, Oxford University Press, 2014, 120.
19 A. Olivieri, *Mandato Civile*, 365. See also G. Coppola Bisazza, *Brevi riflessioni sulla gratuità del mandato*, 485 and A. Watson,*The Law of Obligations in the Later Roman Republic*, Oxford at the Claredon Press, 1965, 146.
20 Dig.17.1.1.4
21 Consequently, the *mandatarius* had to perform his task with ability and "ex bona fide". See C. Sanfilippo, *Corso di diritto romano, Il mandato*, 43.
22 A. Olivieri, *Mandato Civile*, 370.
23 C. Sanfilippo, *Corso di diritto romano, Il mandato*, 34.
24 The *mandarius* could bring an action against the *mandans* (*i.e., actio mandati contraria*) only if the first suffered damages or expenses during the performing of the *mandatum*, see R. Zimmermann, *The Law of Obligations*, 414.
25 Cf. G. Coppola Bisazza, *Cultura e potere, Il lavoro intellettuale nel mondo romano*, Milano, 1994, 293.
26 W.W. Buckland, *A Text-book of Roman Law from Augustus to Justinian*, 1990 Repr. [of the 1921 ed.], 514.
27 The main references for understanding the medieval merchant's family are U. Santarelli, *Mercanti e società tra mercanti*, 2 ed., Torino, Giappichelli, 1992 and A. Sapori, *Il mercante italiano nel Medioevo*, translated into Italian by G. Sapori, Milano, 1983.
28 See U. Santarelli, *Mercanti e società tra mercanti*, 123.
29 See I. Origo, *The Merchant of Prato, Daily Life in a Medieval Italian City*, Penguin, 2017.
30 The words company/companion derive from "cum and panis" and "stant ad unum panem et vinum". See A. Sapori, *Il mercante italiano nel Medioevo*, 43.
31 U. Santarelli, *Mercanti e società tra mercanti*, 124.
32 A. Sapori, *Il mercante italiano nel Medioevo*, 43.
33 *Ibidem*.
34 U. Santarelli, *Mercanti e società tra mercanti*, 127.
35 A. Sapori, *Il mercante italiano nel Medioevo*, 43.
36 See for a general overview, among others, O.W. Jr. Holmes, *The History of Agency*, in Committee of the Association of American Law Schools (ed.), Select Essays in Anglo-American Legal History, vol. 3, Boston, 1909; S.J. Stoljar, *The Law of Agency: Its History and Present Principles*, London, 1961; R. Powell, *The Law of Agency,* 2 ed., London, 1961; *G. Reuschlein*, *Handbook on the Law of Agency and Partnership*, London, 1979; G.H.L. Fridman, *The Law of Agency*, 7 ed., London, 1996; B.S. Markesinis, R.J.C. Munday,*An Outline of the Law of Agency*, 4 ed., London, 1998; Reynolds F.M.R., with the assistance of M. Graziadei,*Bowstead & Reynolds on Agency*, 18 ed., London 2009 and ff. eds.
37 See, for instance, Bristol and West Building Society v. Mothew, [1998] Ch 1, 18, where it is stated: "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several faces. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".
38 F.E. Dowrick, *Relationship of Principal and Agent*, 17 Modern Law Review 24, 31 (1954), affirmed: "Were these duties enforced as a contractual obligations, or as obligations imposed by law? An examination of the judgments in the leading Chancery cases in the formative period of this branch of the law leaves one in no doubt as to the answer. In these cases, the judges themselves did not pretend to be giving effect to what they might presume to have been the common intention of the parties in the particular case, nor did they seek for the elements of a valid contract between the parties before enforcing these rules. On the contrary, the judges imposed these duties and disabilities on agents generally".
39 A.S. Gold - P. B. Miller (eds.), *Philosophical Foundations of Fiduciary Law*, Oxford, Oxford University Press, 2014, 291.
40 Armstrong v. Jackson, [1917] 2 K.B., 822–826.
41 D.J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 Cardozo L. Rev. 215–209 (2004–2005), offers an interesting perspective on the role of the Church in the development of the fiduciary duties in partnership and highlights that: "In short, the common law absorbed the Church's moral norms directly through its reliance on ecclesiastical courts' usury jurisprudence, and indirectly through its later adoption of law merchant and chancery court jurisprudence, both of which had broad jurisdiction over partnership disputes and were heavily influenced by the Roman Catholic Church, its institutions, and its law".
42 See W. Paley, *A treatise on the law of principal and agent: chiefly with reference to mercantile transactions*, 1811, where the author affirmed that the English law of agency was "chiefly with reference to merchant transactions". The opening works on English agency did not investigate the sources or the function of agency, but as Paley wrote, they presented a portrait of the effects of agency itself, the rights and the obligations of the three parties involved, in order to "*enable merchants and others, who may stand in the relative situations of principals or of agents, to ascertain and comprehend the duties imposed upon them in those characters*".
43 There is no assent among scholars about the origins of the English law of agency: probably the law of master and servant, maybe the responsibility of the head of the family, possibly the "uses", or the relations within the clergy, or the person of the *balivus* or *attornatus*. On the history of agency, cf. S.J. Stoljar,*The Law of Agency: Its history and present principles*, London 1961; O.W. Holmes Jr., *The History Of Agency*, Committee of the Association of American Law Schools (ed.), Select Essays in Anglo-American Legal History, vol. 3, 1909; F. Pollock, F. W. Maitland, *The History of English Law before the Time of Edward I*, vol. 2, Cambridge, 1895, 226; M. Mc Gaw *Agency, English Common Law*, The Oxford International Encyclopedia of Legal History, S.N. Katz (ed.), vol. 1, 2009; B.S. Markesinis, R.J.C. Munday,*An Outline of the Law of Agency,* 4 ed., London,1998, 92.
44 The law of agency, became "officially visible", in the panorama of the legal treaties, when, in 1811, English barrister William Paley published a book entitled, *A treatise on the law of principal and agent: chiefly with reference to mercantile transactions*. In the same year in Boston, Livermore published the volume *A Treatise on the Law of Principal and Agent; and of sales by auction*, and in 1839 Story printed his first volume of Commentaries, entitled *Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence*.
45 There are different points of view about the history of the Lex Mercatoria, but all of them highlight that every European commercial country had legal doctrines and rules for merchants that were considered their own rules distinct from the local law. See W. Mitchell, *An Essay on the Early History of the Law Merchant*, Cambridge University Press, 1904, 9.
46 D.J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 105.
47 Ibidem at 237.

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48 W. Mitchell, *An Essay on the Early History of the Law Merchant*, 1.
49 See R.E. Cerchia, *Quando il vincolo contrattuale si scioglie*, 246.
50 P. Le Tourneau*De l'évolution du mandat, D.*, 1992, Chron. 157 ; P. Le Tourneau, *Quelques aspects de l'évolution des contrats*, in *Mélanges Raynaud*, 1985, 349; J. Savatier, *L'évolution contemporaine du droit des contrats*, PUF, 1986; L. Cadiet et alii, *Le droit contemporain des contrats*, Paris, 1987.
51 On *mandat* in general, see among others, P. Le Tourneau,*Mandat*, Répertoire civil Dalloz, 5 éd., 2017; J. Barbieri, *Contrats civils, Contrats commerciaux*, Paris, 1995, Masson; A. Brunet, *Clientèle commune et contrat d'intérêt commun*, in *Mélanges Weill*, 1988, Dalloz; N. Dissaux, *Le mandat, Un contrat en crise?*, Paris, 2011, Economica; J. Ghestin, *Le mandat d'intérêt commun*, in *Mélanges Derruppé*, 1991, Litec; J. Huet, *Les principaux contrats spéciaux*, Traité de droit civil, Ghestin (dir.), 2 éd., Paris, 2001, LGDJ; P. Le Tourneau, *De l'évolution du mandat*, D., 1992, Chron. 157; P. Le Tourneau, J. Fischer, E. Tricoire, *Principaux contrats civils et commerciaux*, Paris, 2005, Ellipses; I. Najjar, *Mandat et irrévocabilité*, D., 2003, Chron, 708; R. Perrot, *Le mandat irrévocable*, Association H. Capitant, t. 10, Paris 1956; Ph. Pétel, *Le contrat de mandat*, Paris, 1994, Dalloz; Ph. Pétel, *Les obligations du mandataire*, préf. Cabrillac, Paris, 1988, Litec; M. Sallé de la Marnierre, *Le mandat irrévocable*, *RTD. civ.*, 1937, 241; L.V. Guillouard, *Traités des contrats aléatoires et du mandat*, 2 éd., Paris, 1894; G. Baudry-Lacantinerie, A. Wahl, *Traité théorique et pratique de droit civil. Des contrats aléatoires. Du mandat, du cautionnement, de la transaction*, t. XXIV, 3 éd., Paris, 1907, Sirey.
52 For instance, see article 1986 c.c. Fr: "*Le mandat est gratuit s'il n'y a convention contraire*".
53 Article 1984 c.c. Fr: "*Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom. Le contrat ne se forme que par l'acceptation du mandataire*". The most significant civil code articles on *mandat* have not been modified since the enactment of the Civil Code in 1804.
54 See P. Le Tourneau, *De l'évolution du mandat*, D., 1992. Chron 157.
55 Cf. J.M. Deluca, *La revocation du mandat professionnel*, June 1965, Phd Thesis, University of Aix-Marseille, 19.
56 A. Bénabent, *Droit civil. Les contrats spéciaux civils et commerciaux*, 9 ed., Paris, Montchrestien, 2011, 475.
57 P. Le Tourneau, *Mandat*, no. 391. Cass. civ., 14 March 1984, no. 83–10.897, *Bull. civ.*, I, no. 92; Cass. civ., 28 January 2003, no. 00–15.519, *RTD com.*, 2003, 561, with note of Bouloc.
58 Cass. civ., 27 March 1973, *D.*, 1973.
59 Cass. req., 31 March 1931, S. 1931, 1, 200; *Gaz. Pal.*, 1931, 1, 842.
60 Cass. civ., 5 February 2002, no. 99–20.895.
61 P. Le Tourneau, *Mandat*, no. 407, affirms: "la notion de contrat d'intérêt commun est une création prétorienne. Curieusement, la réforme des contrats adoptée par l'ordonnance n° 2016–131 du 10 février 2016 l'a ignorée".
62 See on Italian *mandato*: G. Bavetta, *Mandato (dir. priv.), Enc. Giur.*, XXV, Milano 1975, 364; U. Carnevali, *Mandato, Enc. Giur.*, XIX, Roma 1990, 10; A. Luminoso,*Mandato, commissione, spedizione, Trattato di diritto civile e commerciale*, Cicu-Messineo, XXXII, Milano 1984; Id.,*Il mandato*, Torino, 2000; G. Mirabelli,*Dei singoli contratti*, 2 ed., Torino 1968, 548; M. Graziadei, voce *Mandato*, in *Dig. disc. priv., sez. civ.*, Torino 1994, vol. XI, 180; G. Minervini,*Il mandato, la commissione, la spedizione, Tratt. dir. civ.*, Vassalli, VIII, Torino,1957. On *mandato* from a comparative perspective see M. Graziadei, voce *Mandato in diritto comparato*, Dig. disc. priv., Sez. civ., 4 ed., XI, Torino, 1994 and M.J. Bonell, *It is feasible to elaborate uniform rules governing the relations between principal and agent?*, 9 Unif. L. Rev., 52 ss. (1954). On termination of Italian *mandato* see among others, M. Costanza, *La revoca del mandato ed i suoi effetti*, Giust. civ., 2001, 1028; Pajardi, *Il momento di efficacia della revoca tacita nel mandato e problemi connessi*, Riv. dir. civ., 1959, I, 573.
63 Another significant case of irrevocability is the *mandato* conferred by several *mandanti* (*i.e.*, principals) with a single juridical agreement and for the same business: the so-called "*mandato colletivo*" (art. 1726 c.c. It.). In this case the revocation is effective only if made by all the *mandanti*, except where just cause exists. It means that no one *mandante* has the power of revocation (without just cause): if such revocation were permitted, it would alter the interest that binds all the *mandanti*. On the contrary, when a just cause exists, the law considers the interest of the revoking party worthier of protection than the interest of the other parties involved in the legal relationship; in this case, the termination takes an "extensive" effect and provokes a complete termination of the *mandato*.
64 See art. 1723, para. 1, It. c.c.
65 W. Paley, *A treatise on the law of principal and agent: chiefly with reference to mercantile transactions*, 80; R. Powell,*The law of agency*, 378; J. Story,*Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence*, 581.
66 Cf. Frith v. Frith, [1906] AC 254, 259.
67 Cf.P. Puig, *Contrats spéciaux*, Paris, 2007, Dalloz, 481; G. Andreotti, F.M. Dominedò, *Mandato civile*, Nuovo Dig. It., Torino, 1939, 95; W. Paley,*A treatise on the law of principal and agent: chiefly with reference to mercantile transactions*, 80.
68 P. le Tourneau, *Mandat*, no. 414.
69 Cf. J. Stoufflet, *Le mandat irrévocable, instrument de crédit*,Mélanges Colomer, Litec, 1993, 477.
70 See P. Le Tourneau,*Mandat*, no. 400: "Néanmoins, une manière de créer l'irrévocabilité, conventionnelle mais de plein droit, est de lier un mandat dont il est expressément prévu qu'il est l'accessoire d'un contrat principal (…), l'ensemble formant un tout indivisible".
71 See Cass. civ., 3 November, 1947, *JCP* 1947, II, 4009; Cass. civ., 17 July 1973, *Bull. civ.*, I, no. 247.
72 P. Watts - F. M. B. Reynolds, *Bowstead and Reynolds on agency*, 19 ed., London, Sweet & Maxwell, 2010, 604, 605.
73 *Knight v. Burkeley*, (1859), 33 L.T.O.S. 7.
74 R. Munday, *Agency, Law and Principles*, 3 ed., Oxford University Press, 2016, 359.
75 P. Watts - F. M. B. Reynolds, *Bowstead and Reynolds on agency*, 652.
76 See Slatter v. Railways Commissioners (New South Wales), (1931) 45 C.L.R., 68; Griffin v. Clark (1940) 40 S.R. (N.S.W.) 409; Re Hartt Group and Land Securities Ltd, (1984) 7. D.L.R. 4th 89.
77 Beale (ed.),*Chitty on Contracts*,vol. 2,*Specific contracts*, 30 ed., London 2008, 104, note 124.
78 P. Watts - F. M. B. Reynolds, *Bowstead and Reynolds on agency*, 607.
79 M. Mc Gaw, *A History of the common law of agency with particular reference to concept of irrevocable authority coupled with an interest*, 2005, Phd Thesis, 4.
80 Beale (ed.), *Chitty on Contracts*, vol. 2, *Specific contracts*, 93.
81 P. Watts - F. M. B. Reynolds, *Bowstead and Reynolds on agency*, 605.
82 Leading cases are Walsh v. Whitcomb, 2 Esp. 565 1797, and Smart v. Sandar, 5 C.B. 89, 1848. In the latter case it reads: "when an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest which is commonly said to be irrevocable". In Clerk v. Laurie, (1857) 2 H & N 1999, Williams J. stated that: "What is meant by an authority coupled with an interest being irrevocable is this – that where an agreement is entered into on a sufficient consideration, hereby an authority is given for the purpose of securing some benefit to the donee of the authority, such has authority is irrevocable".
83 The Power of attorney Attorney Act of 1971, s. 4, and the Mental Capacity Act of 2005 provide examples of irrevocable authority. The latter created a new an instrument, the Lasting Power of Attorney (to replace the Enduring Power of Attorney), which could not be revoked for the mental incapacity of the donor and that may be exercised according to the provisions of the Act itself.

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84 P. le Tourneau, *Mandat*, no. 400: “le mandat est révocable par nature, de sorte que le mandat réellement irrévocable changerait de nature et ne serait pas un mandate”.

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